85-414 (2)

No. A-77

Supreme Court, U.S.

SEP 9 1985

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,

Petitioner,

vs.

SPERRY RAND CORPORATION, a Delaware Corporation,

Respondent.

APPENDIX

HELEN M. AMBROSE
3528 27th Avenue South
Minneapolis, Minnesota 55406
(612) 729-0010
Petitioner Pro Se

1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSTOM HOUSE
1114 Market Street
St. Louis, Missouri 63101
July 19, 1985

Robert D. St. Vrain
Clerk

314-425 5600
FTS: 279-5600

Mr. Frank Dosal, Clerk
U. S. District Court
110 S. Fourth St.
Minneapolis, MN 55401

Re: No. 84-5183-MN Helen Ambrose vs. Sperry Rand Corp., etc., et al. (4-74-627)

Dear Sir:

The mandate of this Court is enclosed together with a receipt therefor in the above case. We would appreciate it if you would sign, date and return the receipt to this office.

Since no timely cost bill was filed, no costs will be taxed on appeal.

Returned are three volumes of transcript and two volumes of transcript.

Sincerely,

ROBERT ST. VRAIN, CLERK
by /s/ E. Hoffman
Deputy Clerk

eh
Enclosures 6

cc: Helen Ambrose
David S. Doty
James T. Hansing
Hyman Edelman
Stewart C. Loper
Richard A. Williams, Jr.
J. Richard Bland

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Helen Ambrose,

Plaintiff,

vs.

Sperry Rand Corp., et al,

Defendant

No. 4-74 Civil 627
USCA #84-5183d

You are hereby notified that in the above-entitled cause, on the 22nd day of July, 1985 we filed certified copy of opinion and judgment from the Court of Appeals, Eighth Circuit that it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance

with the opinion of this Court. See 8th Circuit Rule 14. March 11, 1985.

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Minneapolis, MN. 55406
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James T. Hansing
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FRANCIS E. DOSAL, CLERK
by: /s/ Judith E. Palmer
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 84-5183MN

Helen Ambrose,

Appellant,

vs.

Sperry Rand Corp., et al,

Appellees.

September Term, 1984
CV 4-74-627

Appeal from the United States District Court for the District of Minnesota

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court. See 8th Circuit Rule 14.

March 11, 1985

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

7/20/85

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

May 13, 1985

Ms. Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN 55406

Re: No. 84-5183-MN Helen Ambrose vs. Sperry Rand Corp., etc., et al

Dear Ms. Ambrose:

Enclosed is a copy of an order entered by us today at the direction of the court.

Sincerely,

/s/ Michael E. Gans
Michael E. Gans
Chief Deputy

MEG/cgj
Enclosure

cc: Mr. David S. Doty
Mr James T. Hansing
Mr. Hyman Edelman
Mr. Stewart C. Loper
Mr. Richard A. Williams, Jr.
Mr. J. Richard Bland
Ms. Phyllis Farguharson, Court Reporter
Mr. Frank Dosal, Clerk, U.S. District Court
FOR INFO ONLY:
Honorable Earl R. Larson
(4-74-627)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5183-MN

Helen Ambrose,

Appellant,

vs.

Sperry Rand Corp., etc., et al,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Appellant's motion for reconsideration or to vacate or modify orders and to prevent manifest injustice, having been considered by the court, is denied.

May 13, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

March 11, 1985

Ms. Helen M. Ambrose
Mr. James T. Hansing
Mr. Steward C. Loper
Mr. J. Richard Bland
Mr. David S. Doty
Mr. Hyman Edelman
Mr. Richard A. Williams
Mr. Frank Dosal, Clerk (Civ 4 74 627)

Re: 84-5183 Helen Ambrose v. Sperry Rand Corp., et al Counsel:

Enclosed is a copy of the opinion of this Court filed today in the above case. Judgment in accordance with the opinion is also entered today.

Please consult the appropriate Federal Rules of Appellate Procedure and the Eighth Circuit Rules (15 & 16) for post-opinion procedure, particularly Circuit Rule 16 (d).

Your attention is also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j). Itemized and verified bills of cost are to be filed with this office with proof of service within 14 days from this date. We would appreciate it if counsel for the prevailing party would promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. If the prevailing party fails to submit an itemized bill of cost on a timely basis, this office

will assume that the right to recoup costs has been waived. Itemized bills of cost which are not timely filed will not be processed without a special order of the Court. Similarly, objections to requested bills of cost must also be submitted on a timely basis-within 10 days of the bill of costs.

Your prompt attention to this request will be appreciated.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5183

Delores Elliott,
Helen Ambrose,

Appellants,

Roberta Pettit, and all other persons similarly situated,

v.

Sperry Rand Corporation, a Delaware corporation, The International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of The International Brotherhood of Electrical Workers,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Submitted: February 12, 1985
Filed: March 11, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

This appeal is from a May 31, 1984 order of the district court denying certain post-judgment relief following an approved settlement in a sex discrimination lawsuit brought against Sperry Rand Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and the local union. Appellant, Helen Ambrose, is an individual plaintiff who sought by a post-judgment motion and now seeks by this appeal to upset the approved settlement by her attack on the ethics, impartiality, conflict of interests, and fee award of certain counsel members of the Hvass law firm, who represented plaintiffs. The appellees contend the district court properly terminated the action by granting Sperry Rand's motion to dismiss with prejudice, thereby refusing to invalidate the settlement.

The voluminous record shows that the settlement was signed by the parties May 20, 1981, approved by the district court August 11, 1981, and affirmed by decision of this court filed on June 23, 1982. The eight-page memorandum of the district court dated May 31, 1984, which accompanied the appealed order now before this court, shows the district court considered and ruled on the claims of plaintiff-appellant, concluding defendant Sperry Rand had complied with the terms of the stipulated settlement agreement and that plaintiffs' counsel had done an excel-

lent job. The court agreed with the conclusion of the Ethics Committee of the Hennepin County Bar Association and the Lawyers Professional Responsibility Board that the ethics complaint should be dismissed and found no conflict of interests. The district court noted Sperry Rand agreed to arbitrate any disputes which remain and mentioned one dispute over posting of first line supervisory positions and another over access to two reports. The court found the misunderstanding and dispute over those two matters had been resolved and opined that any other disputes could be resolved in grievance procedures, arbitration, or by administrative agencies.

The district court calculated the considerable risks to plaintiffs of starting the litigation over and concluded, "After 10 years the entire matter should be put to rest."

The standard of review of this approved settlement is whether the district court abused its discretion. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) The thorough May 31, 1984 memorandum shows the district court diligently and carefully considered the attacks on the settlement and plaintiffs' counsel.

We find no indication that the district court abused its discretion. No error of law or fact appearing and it being clear that further expression by us would have no precedential value, the judgment of the district court is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER
4-74-Civil-627

On May 31, 1984 I filed 2 Orders and a separate Memorandum.

One Order denied the motion of pro se plaintiff Ambrose to Invalidate Settlement, to Stay Order for Judgment and for a New Trial on all issues. The motion was based on a claimed conflict of interest of one of the law firms representing the named plaintiffs and the class.

A second Order granted the motion of defendant Sperry Rand for an Order dismissing the action as to all parties and discharging from further supervisory jurisdiction of the Court In this Order I reviewed some of the history of the case and Sperry's compliance and also disposed of several minor matters.

The Memorandum reviewed the history of the litigation and made reference to a claim of possible conflict of interest on the part of the Hvass law firm. I stated that this claim was not raised during the extended trial or the settlement negotiations nor in the Court of Appeals.

On June 8, 1984 Ms. Ambrose filed a Motion for New Trial and Amendment of Judgments and stated that a supporting Memorandum and affidavits would be submitted within 20 days. The additional materials were submitted on July 18, 1984.

I will treat the June 8 motion as a Motion for Reconsideration of the May 31 Orders.

On June 8 Ms. Ambrose also filed a Notice of Appeal and on June 15 a notice to clerk to Transmit and Certify a Designated Record and Settlement of Issues.

I am also in receipt of an exchange of correspondence between Ms. Ambrose and attorneys Roback and Wolf, the latest attorneys to represent Ms. Ambrose.

The last Ambrose letter was received on August 27, 1984. The correspondence relates to a private dispute as to attorneys fees and will not be considered by me.

Though an appeal appears to be pending I will treat the latest motions as Motions for Reconsideration.

I have considered the Motions, Memoranda, Affidavits and Exhibits. No further hearing or argument is needed or would be productive.

Ms. Ambrose charges me with bias and fatigue. I deny the bias but admit the fatigue.

IT IS ORDERED:

1. That the June 8, 1984 Motion for New Trial and Amendment of Judgment be denied.

2. That the Motion for Reconsideration of the 2 May 31, 1984 Orders and Memorandum be denied.

September 10, 1984.

/s/ Signature illegible
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, et al,

Plaintiff,

vs.

Sperry Rand Corporation, et al,

Defendant.

No. 4-74 Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 10th day of September, 1984 we filed Judge Larson's Order 1. That the June 8, 1984 motion for new trial and amendment of Judgment be denied. 2. That the motion for reconsideration of the May 2, 1984 Orders and Memorandum be denied.

FRANCIS E. DOSAL, CLERK
By _____
Deputy Clerk

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER
4-74-Civil 627

Defendant Sperry Rand Corporation (Sperry) has moved for an Order for Judgment dismissing the action as to all parties and discharging the parties from the supervisory jurisdiction of this Court.

The Court held 3 hearings in December 1983 and since then has considered various affidavits, letters and memoranda which have been submitted to the Court.

On August 11, 1981 the Court entered an Order approving the Stipulation of Settlement which had been entered into by the parties on May 20, 1981. The Court also determined that the Settlement was fair, adequate and reasonable. The Court of Appeals on June 23, 1982 affirmed this Court's determination.

The Court finds that the parties have complied with the Stipulation and this Court's Orders. Sperry has paid the class members $1,762,618.47. The sum of $1,794.67 remains unclaimed in the settlement fund. Sperry has also complied with the Court's Order relating to the payment of attorneys fees and costs to class counsel. In addition Sperry and the Local Union have modified the collective bargaining agreement as agreed to. Sperry has furnished to the Court the Hays studies, has established appropriate jobs in Plating and Electro-Mechanical areas for assemblers, has established selection criteria for first line supervisors, has encouraged employees to avail themselves of its tuition reimbursement program and has provided notice to employees of the criteria for promotion to various jobs.

IT IS HEREBY ORDERED THAT:

1. The action is dismissed in all its counts and claims as to all parties with prejudice.

2. Class members are barred and enjoined from prosecuting any other action involving the claims of the class action complaint and defendants are barred and enjoined from prosecuting any action against a class member arising from a claim embraced in the class complaint or for defense costs or fees.

3. The parties be discharged from the supervisory jurisdiction of this Court arising from the previous Orders of this Court, the Stipulation of Settlement and the power granted to the Court by Rule 23 relating to class actions.

4. Sperry pay to 5 employees or former class members employees—Axtell, Turnipseed, Olson, Silva and Turner —the amounts due them upon proof of membership in the class and their entitlement to payment.

5. Sperry within 10 days pay the sum of $1,794.67 into the Clerk's registry fund. The list of 22 class members and the amounts due them is Attachment 1 to the Achterhof Affidavit (Clerk's Folder IX-1). Sperry will within 15 days file with the Clerk a supplemental list which will include first names, the most recent address and any other identifying information. Payment to the class members will be made by the Clerk upon the submission of a claim and proper proof. After 5 years the Clerk will remit the balance remaining in the fund to the Treasurer of the United States.

Let Judgment be Entered Accordingly.

May 31, 1984.

/s/ Earl R. Larson
United States Senior District Judge

Separate Memorandum Filed

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER
4-74-Civil-627

Helen M. Ambrose as Pro Se Plaintiff filed a motion on January 3, 1984 to Invalidate Settlement and to Stay Order for Judgment. The motion also requests the Court to set aside previous findings, opinions and judgments, to permit further discovery, and for a new trial on all issues held by the Hvass law firm which acted as co-counsel for the plaintiff class.

The Court has considered the motion, affidavit, memoranda and letters, and the claims and arguments of the parties.

The Court refers the parties and counsel to the separate Memorandum to be filed.

IT IS ORDERED:

That the motion be denied.

May 31, 1984.

/s/ Earl R. Larson
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, et al,

Plaintiff(s),

vs.

Sperry Rand Corp., et al,

Defendant(s).

No. 4-74- Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 31st day of May, 1984, we filed Judge Larson's

Order that Helen M. Ambrose's motion be denied. We also filed Judge Larson's Memorandum.

ROBERT E. HESS, CLERK
By: _____
Deputy Clerk

J. Richard Bland
Richard A. Williams, Jr.
Steward C. Loper
Helen Ambrose
David S. Doty
James T. Hansing
Hyman Edelman

(Title of Cause.)

No. 4-74 Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 31st day of May, 1984, we filed Judge Larson's Order as follows:

1. The action is dismissed in all its counts and claims as to all parties with prejudice; 2. Class members are barred and enjoined from prosecution any other action involving the claims of the class action complaint and defendants are barred and enjoined from prosecuting any action against a class member arising from a claim embraced in the class complaint or for defense costs or fees. 3. The parties be discharged from the supervisory jurisdiction of this Court arising from the previous Orders of this Court, the

Stipulation of Settlement and the power granted to the Court by Rule 23 relating to class actions; 4. Sperry pay to five employees or former class members employees—Axtell, Turnipseed, Olson, Silva and Turner—the amounts due them upon proof of membership in the class and their entitlement to payment; 5. Sperry within 10 days pay the sum of $1,794.67 into the Clerk's registry fund. The list of 22 class members and the amounts due them is Attachment 1 to the Achterhof Affidavit (Clerk's Folder IX-1). Sperry will within 15 days file with the Clerk a supplemental list which will include first names, the most recent address and any other identifying information. Payment to the class members will be made by the Clerk upon the submission of a claim and proper proof. After five years, the Clerk will remit the balance remaining in the fund to the Treasurer of the United States. Judgment was entered accordingly.

ROBERT E. HESS, CLERK
By: ————————
Deputy Clerk

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO. and Local 2047 of the Electrical Workers,

Defendants.

No. 4-74 Civ. 627

NOTICE OF ASSOCIATION OF COUNSEL

TO DEFENDANT SPERRY RAND CORPORATION and DAVID S. DOTY, its attorney:

DEFENDANT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and JAMES T. HANSING, its attorney; and

DEFENDANT LOCAL 2047 and HYMAN EDELMAN, its attorney:

PLEASE TAKE NOTICE that the undersigned are hereby associated with Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, 2250 IDS Center, Minneapolis, Mn 55402, as attorneys for the plaintiffs in the above captioned matter.

HVASS, WEISMAN & KING
By /s/ Richard A. Williams, Jr.
715 Cargill Building
Minneapolis, MN 55402
333-0201

We hereby consent to the above association of counsel

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ J. Richard Bland
2250 IDS Center
Minneapolis, MN 55402
338-0661

Dated: ———— 1979.

STATE OF MINNESOTA

ss.

COUNTY OF HENNEPIN

AFFIDAVIT OF SERVICE BY MAIL

Melba H. Bylund, being first duly sworn, deposes and says: That on the 30th day of March, 1979, she served the attached Notice of Association of Counsel upon the following attorneys representing the parties as indicated, by depositing a true and correct copy thereof in the U. S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorneys.

David S. Doty
Attorney for Sperry Rand Corp.
4344 IDS Center
Minneapolis, MN 55402

James T Hansing
Attorney for Local Union No. 2047
656 IDS Center
Minneapolis, MN 55402

Hyman Edelman
Attorney for International Brotherhood
of Electric Workers
1800 Midwest Plaza Building
Minneapolis, MN 55402

Subscribed and sworn to before me this 30th day of March, 1979.

/s/ Carla M. Stevenson
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

MEMORANDUM ORDER

No. 4-74-Civ. 627

Plaintiffs bring this action against defendants Sperry Rand Corporation, doing business through its Univac Division (hereinafter "Univac"), Local Union No. 2047 of the International Brotherhood of Electrical Workers (hereinafter "Local"), and the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter "International"). Plaintiffs allege that defendants engage in a pattern or practice of sex discrimination, and plaintiffs assert claims (1) or violation of the "Back Pay Act of 1963," 29 U.S.C. § 206); (2) for violation of the unions' duty of fair representation and for Univac's breach of contract, and (3) for violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 200-e, *et seq*. Plaintiffs seek to main-

tain this action as a class action. Before the Court for decision are cross motions for an Order certifying and decertifying the purported class under Rule 23(c) (1).

I. *BACK PAY ACT.*

Claims arising under 29 U.S.C. § 206 are governed by the procedural provisions of 29 U.S.C. § 216(b). The "opt in" procedure of § 216(b) is totally inconsistent with the "opt out" procedure of Rule 23(b) (3) and is equally inconsistent with the binding effect of Rule 23(b) (2) class actions. Rule 23 and § 216(b) are irreconcilable. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *see also, Cavanaugh v. Minneapolis Aquatennial Assoc.*, No. 4-75-Civ. 628 (D. Minn. May 3, 1976) Slip Op. at 5-6. Plaintiffs' Back Pay Act claim cannot be maintained as a Rule 23 class action.

Filed May 28, 1976

Harry A. Sieben, Clerk
By /s/ Cyndee Beneon
Deputy

II. *DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT.*

The burden of establishing that a case is appropriate for treatment as a class action is on the plaintiffs. With respect to their representation/breach of contract claim, plaintiffs have failed to discharge this burden.

The complaint alleges a typical claim under *Vaca v. Sipes* 386 U.S. 171 (1967), involving the employer's breach of contract and the union's bad faith failure to discharge its duty as the exclusive representative of its em-

ployees in processing grievances under the contract. The questions of law and fact underlying a typical *Vaca v. Sipes* claim pertain to the processing of grievances; the employees who may have claims are those whose grievances were improperly processed. Certainly, in order to maintain a *Vaca* type class action, plaintiffs must at the least identify those grievances which the union has improperly handled and which may give rise to common claims among an identifiable class of persons. Plaintiffs have identified no such grievances. If there are persons with claims for the perfunctory processing of grievances, the Court does not know who they are, what the subject matter of their grievances is, or what steps if any the defendant unions took in processing those grievances. There is simply no basis for certification of a typical *Vaca v. Sipes* class action.

In fairness to plaintiffs, it must be emphasized that plaintiffs apparently do not rely on the non-*processing* of filed grievances. Rather, plaintiffs argue, the gravamen of there action is the unions' failure to *initiate* grievance procedures, *i.e.*, the failure to file grievances after receipt of complaints by union members alleging sex discrimination in violation of the non-discrimination clause of the collective bargaining agreement. However, this theory of unfair representation is essentially identical to a traditional *Vaca v Sipes* grievance processing claim, for in both cases liability is premised on a breach of contract by the employer and on the union's breach of its duty to represent the employees under the grievance machinery of the contract. The ". . . necessary condition precedent to suit . . ." in either case is the exhaustion by the employee of those steps in the grievance procedure which the employee has

power to invoke. *Butler v. Local Union 823, International Brotherhood of Teamsters, Etc.*, 514 F.2d 442, 449-50 and n.11 (8th Cir. 1975), *cert. denied*, 423 U.S. 924 (1975). The theories are different only in that in the latter case employees are alleged to have exhausted their individual recourse under the grievance procedure simply upon making complaints to the union, notwithstanding the employee's failure to file a grievance. In their complaint, plaintiffs do allege that the unions have exclusive authority under the relevant collective bargaining agreements to *initiate* grievances. If this is true, *i.e.*, if the employee herself is not authorized to file grievances against the employer, then the making of complaints to the union may be sufficient exhaustion of the grievance machinery to lay the foundation for an unfair representation claim against the unions and a breach of contract claim against the employer.

Even under this approach, however, the class proponent should identify those particular complaints which the union is alleged to have abandoned or ignored in violation of its duty of fair representation. The Court should at a minimum be informed as to the subject matter of the complaints and the number of persons involved in the complaints, so that some rational decision may be had as to the questions of numerosity, typicality, and commonality. Rule 23(a) (1), (2) and (3). Although the record indicates that a great many complaints have been directed to the unions during the last several years, plaintiffs have not specified which complaints form the basis for the claims to class relief, and this Court cannot certify a class action on the basis of its own speculations as to which complaints plaintiffs may believe give rise to liability.

Additionally, the record is presently inadequate for class certification because there is no evidence that in fact the unions do have exclusive control over the initiation of grievances. Plaintiffs' allegations of exclusive union control, stated in their complaint, have been denied by all three defendants, and the contractual provisions referred to in the complaint have not been set forth on the record. In her deposition, plaintiff Elliott seems to have admitted that exclusive authority to initiate and pursue grievances may not be in the unions:

> "The procedure is not for an individual to do so. You must accost [sic] it through the union *if possible. If they reject this, then you can do it on your own,* but our procedure is that the union will pursue it." [Emphasis supplied.]

Although plaintiffs at this time are not required to prove that their claim is meritorious, in the Court's view plaintiffs should demonstrate that some state of facts exists which may justify class-wide relief under the legal theory which plaintiffs advance. The Court is entitled to know what the grievance procedure language is before being asked to certify a class under plaintiffs' "grievance initiation" theory.

Plaintiffs have failed to demonstrate the appropriateness of class treatment of the unfair representation/breach of contract claims. Since this action has been pending for over a year, and since the parties have engaged in extensive discovery directed to the questions of maintenance of the case as a class action, plaintiffs' failure to satisfy their burden is a sufficient ground to order conditional decertification of the class with respect to these claims.

III. *TITLE VII.*

It is settled law that Title VII cases are well suited for treatment as class actions. Part III, B., (2), *ante*. In order to maintain a Title VII action as a class action, plaintiffs must satisfy all the prerequisites of Rule 23(a), in addition to one of the requirements of Rule 23(b). *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

A. *Rule 23(a) (1), (2) and (3).*

The Court is satisfied that plaintiffs easily fulfill the requirements of numerosity, commonality and typicality. Rule 23(a) (1), (2) and (3). Defendant unions concede as much, although the Local argues that *if* Rule 23(a) (3) is a truly separate requirement, plaintiffs have not satisfied it. Univac's arguments focus on the pleadings and largely overlook the extensive discovery materials which have been generated.

In employment discrimination cases, the numerosity requirement has not been stringently applied. *Arkansas Education Association v. Board of Education*, 446 F.2d 763, 765-66 (8th Cir. 1971) (less than two dozen). The materials on file demonstrate that the prospective class contains in excess of 2,000 members. Joinder of all such persons in a single action is patently impracticable.

Plaintiffs allege that defendants follow a policy or practice of discrimination based on sex in connection with, inter alia, training, promotions, seniority systems, hiring, and maintenance of job classifications. The discrimination alleged is based on a characteristic common to the class. Common questions of law and fact exist concerning the nature of defendants' practices, the effect of these prac-

tices on class members, and the legality of these practices under Title VII. A liberal construction of Rule 23(a) (2) and (3) is appropriate in Title VII cases, *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 311 (6th Cir. 1975).

The same is true as to the typicality requirement of Rule 23(a) (3). Plaintiffs Elliott and Ambrose have each been employed by Univac and have been members of the Local and International for over 20 years. Plaintiffs allege that during their employment at Univac they have been promoted only three or four times, and that they have been continuously subjected to defendants' discriminatory practices. Plaintiff Elliott currently holds the position of General Inspector "B". Plaintiffs claim that the formation of two General Inspector classifications, "A" and "B", was discriminatory in that females were "funneled" into the lower paying "B" classification and in that the opportunities for advancement are significantly greater in the predominantly male (118 males, 1 female) "A" classification. The complaint alleges that the plaintiffs, as well as the class

> ". . . have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers, solely because of their sex. . . ."

Defendant Univac argues that it is impossible for the Court to determine whether plaintiffs' claims are typical of the claims of the class because plaintiffs have failed to specify what their individual claims are. It is true that plaintiffs have not set forth specific incidents (such as firing, demotion or lay off) which form the basis for their individual claims. However, plaintiffs' personal claims are

not at all obscure. Plaintiffs claim that defendants' practices have denied plaintiffs opportunities for advancement, that this denial has been solely due to plaintiffs' sex, and that as a result of this denial plaintiffs have suffered economic detriment. The basis for plaintiff Elliott's claim is particularly clear, since she occupies a job position which is directly tied into defendants' allegedly discriminatory denial of advancement opportunities[1] and claimed relegation of women to lower paying positions. The individual claims are typical of the claims of the class.

The fact that plaintiffs, after over 20 years' employment at Univac, now hold some of the higher paying jobs in the bargaining unit does not render their claims atypical. As of May 3, 1975, plaintiffs earned $4.54 and $4.49 per hour. less than $1.35 per hour more than the lowest paid new employees in the bargaining unit, and less than $0.40 an hour more than employees with only two years' experience. Plaintiffs' *relatively* higher paying jobs do not set them apart from the class they seek to represent.

Univac argues that because the various jobs at its plants have no common criteria and can be visualized as discrete entities, plaintiffs' claims cannot be typical of the claims of those occupying entirely separate positions. The fact that varying fact patterns may exist is generally considered immaterial, where all claims are based on the same remedial or legal theory, and especially where the common theory is similarly central to all claims. *See generally*, 7 Wright & Miller, Federal Practice and Procedure: Civil § 1764 (1972). In the present case, the claims of the class

[1]Since plaintiffs do allege individual claims, Univac's arguments that plaintiffs cannot represent the class because they have not stated personal claims for relief and because they are not aggrieved persons within the meaning of Title VII are not persuasive.

are based on an identical theory which is central to all, and the possible existence of discrete factual situations is unimportant, particularly in a Title VII action where courts exercise liberality in applying Rule 23(a) (3).

B. *Rule 23(a) (4).*

(1) *Factual background—*

The critical question regarding class certification under Title VII is whether plaintiffs will fairly and adequately represent the interests of the class. Rule 23(a) (4). Defendants direct the Court's attention to five sources of alleged antagonism between plaintiffs and the class which in defendants' view demonstrates that plaintiffs cannot be adequate representatives.

The first source of antagonism concerns plaintiffs' management of union affairs from 1968 until 1970. In June 1968 plaintiff Elliott was elected president of the Local and plaintiff Ambrose was elected to the Local's Executive Board. From that time until their removal from office in 1970 both plaintiffs were key figures in various disputes within the Union. These difficulties began soon after plaintiffs took office and centered on the organizational structure and internal procedures of the Local. Plaintiffs believed the office of president should be a full time position, whereas certain other officers believed that only the business manager should act in a full time capacity. Plaintiffs prevailed on this issue, and beginning in the fall of 1968 the Local operated with two full time officers. A number of disputes arose concerning the respective responsibilities of the president and the business manager and concerning the Executive Board's policy making

function. Other disagreements involved the sending of ten union members to a labor law convention in Texas, the handling of two controversial grievances, the tape recording of union meetings, and the plaintiffs' involvement in antiwar activities.

In 1969 a prenegotiating committee was established in anticipation of the 1970 contract negotiations. In the fall of 1969 plaintiff Elliott retained an attorney to assist her and the union in this regard. This action was strongly opposed by the business manager, who regularly employed different counsel on behalf of the Local. Plaintiff Elliott's attorney introduced plaintiffs and other members of the prenegotiating committee to a Mr. Morris. In the spring of 1970 Morris spearheaded an attempted "raid" on the Local by an unaffiliated union. This raid was initiated by a mailing to all members of the Local. Elliott's attorney withdrew from representing the Local, stating his belief that the raiding union would better represent Univac's employees than did the Local and noting his conflict of interest. Defendants suggest that the mailing list used by Morris came from plaintiff Elliott. In her deposition Elliott denied that she provided such a list, and both Elliott and Ambrose stated that they had no prior knowledge of the raid or of Morris' involvement with the raiding union. Both plaintiffs signed a statement opposing the raid. Neither plaintiff signed an authorization card for the raiding union. Beyond this, neither took any steps to prevent the raid. Plaintiffs assert that it was made clear to them that responsibility for such opposition lay with the business manager and not with the president or the Executive Board. Ambrose prepared certain leaflets or flyers setting forth members' rights under the Labor-Management Report-

ing and Disclosure Act and sought to assure members of their right to sign authorization cards for the raiding union if they chose to do so. Ambrose believed that the Local was attempting to intimidate its members, and she believed it was her responsibility as a union officer to attempt to clarify members' rights. She felt that the raid was a useful lever in the impending negotiations. Defendants argue that plaintiffs' actions and inactions regarding the raid constituted a serious breach of their fiduciary duties as union officers.

It is clear to the Court that there were serious and repeated disagreements within the Local during this period. These conflicts unquestionably involved the then union leadership and the supporters of the opposing factions. The extent of rank-and-file involvement is uncertain.

Defendants argue secondly that, apart from the actual dissension which occurred from 1968-1970, plaintiffs, by virtue of their positions as active and important union officers during this period, possess interests which inherently conflict with those of the class. As vigorous advocates for the rights of women and minorities, and as negotiators of the 1970 collective bargaining agreement, plaintiffs may indeed be the most important witnesses for the Local with respect to questions of liability for the period when plaintiffs were officers of the Local.

Third, in 1970 plaintiffs were removed from office by the International and were suspended from holding offices for five years. A trusteeship was imposed upon the Local by the International. Since their removal, plaintiffs have initiated proceedings against the defendant unions on three occasions. In 1970 plaintiff Elliott brought an action in Ramsey County District Court against the International

challenging her removal and seeking reinstatement. Although the affirmative relief Elliott seeks in that case has become moot, Elliott still desires to pursue that action in order to vindicate herself. In 1971 plaintiffs brought charges before the Secretary of Labor challenging the Local's election, which was held after the trusteeship was removed. The Secretary found that plaintiffs' charges lacked merit. In 1974 plaintiffs again filed charges with the Secretary of Labor, seeking to have the 1974 Local election set aside. The Secretary found merit in plaintiffs' claim and has brought an action which is now pending in Federal District Court in St. Paul. Since their removal plaintiffs have also complained on numerous occasions to the Local about a wide variety of matters. Defendants characterize the bringing of these charges and complaints as part of a pattern of attempted retaliation against the unions for plaintiffs' removal from office. Defendants claim that the present action is likewise motivated in large measure by plaintiffs' desire for vindication and that plaintiffs thus possess unique interests in this action which are antagonistic to and are not shared by the class.

Fourth, defendants claim that the class itself does not perceive plaintiffs to be proper or adequate representatives. Following the filing of this lawsuit, the Local held a regularly scheduled meeting on December 12, 1974. As is customary, the meeting was conducted in two segments to accommodate members who work on separate shifts. At the second meeting 101 members were present. By a vote of 83-0 a resolution was passed expressing nonsupport for this lawsuit. Subsequent to this meeting, the Local's business manager, Mr. Curley, received a number of unsolicited petitions stating that the signators are not

involved in this action and do not wish to be represented by the named plaintiffs. The petitions contain 372 signatures.

Fifth, defendants note that plaintiffs have been activists in union affairs and that their disability from holding union office has now ended. Defendants argue that plaintiffs may well attempt to run for office again and may use this lawsuit to advance their political objectives. In their depositions, plaintiffs indicate that they have no present plans to campaign for office, but they have certainly not ruled out that possibility, which has been suggested to them by members of the Local. In view of plaintiffs' obviously keen interest in union affairs, the probability that these plaintiffs may again seek elective offices within their union is substantial.

(2) *The nature of Title VII suits generally and of Title VII class actions*

In assessing whether this evidence of antagonism is sufficient to demonstrate that plaintiffs do not satisfy the requirements of Rule 23(a) (4), it is important to understand the nature of Title VII actions, for the relationship between Title VII and Rule 23 is in a sense unique.

It is well recognized that when an individual plaintiff brings an action under Title VII alleging a general policy of discrimination, her lawsuit may be a vehicle for vindicating important social policies and not only for righting individual wrongs. *Williams v. General Foods Corp.*, 492 F.2d 399, 406 (7th Cir. 1974). Not only racial discrimination, but sex discrimination as well, is by definition class discrimination. *Oatis v. Crown Zellerbach Corp., supra,* 398 F.2d at 499; *Bowe v. Colgate-Palmolive Co.*, 416

F.2d 711, 719 (7th Cir. 1969). It has been said that a Title VII suit, "[w]hether in name or not, . . . is perforce a sort of class action for fellow employees similarly situated." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 50 (5th Cir. 1974) (Wisdom, J.) (hereinafter *Rodriguez*). It is familiar learning that a single charge of employment discrimination may form the basis for a full inquiry into the unlawful employment practices of defendants. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975).

Since Title VII actions are inherently well adapted to class action treatment, courts have been quite liberal in applying the prerequisites of Rule 23(a) *Rodriguez supra*. As a consequence, the question of whether a court in a *non*-class action is nonetheless empowered under Title VII to grant appropriate class wide relief has arisen infrequently. In *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201-1202 (7th Cir. 1971) (hereinafter *Sprogis*), *cert. denied*, 404 U.S. 991 (1971), the Court held that:

> " . . . Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases."

See, 7 Wright & Miller, *supra*, § 1771 at 663-64. *cf.*, *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353 n.3 (7th Cir. 1975) (*Sprogis* a specialized rule in Title VII cases, which may or may not withstand intervening Supreme Court decisions). The Fifth Circuit reached a contrary result in *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 163-64 (5th Cir. 1971), *petition for rehearing and rehearing en banc denied*, 450 F.2d 881 (1971) (Tuttle, Brown

and Wisdom, JJ., dissenting) (hereinafter *Danner)*, a case in which plaintiff sought relief solely on her own behalf and never attempted to champion the rights of similarly situated employees.

In the present case plaintiffs allege they have been harmed by a policy of class-wide discrimination practiced by defendants, and it seems probable that plaintiffs will proceed at trial by means of evidence, such as statistical disparities, which demonstrates class discrimination, and which calls for class relief. Should plaintiffs prevail on their individual claims, it would be anomalous for a Federal District Court, having found that class-wide discrimination is being practiced in contravention of Title VII, and being armed by Title VII with a full panoply of equitable powers to remedy such discrimination, to stay its hand and in effect sanction the continued violation of Title VII. *Cf., Jenkins v. United Gas Corp., supra,* 400 F.2d at 34 and n.15; *but see, Danner, supra.* In related circumstances courts have found that the duty of the judiciary to grant full relief under Title VII mandates the joinder of additional parties late in the proceedings, *Gilmore v. Kansas City Terminal Railway Co.,* 509 F.2d 48, 52-53 (8th Cir. 1975), or the belated certification of the class for purposes of back pay as well as for purposes of declaratory and injunctive relief. *Bowe v. Colgate-Palmolive Co., supra,* 416 F.2d at 719-21; *cf., Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

Although the Court must be attentive to granting full relief under Title VII in appropriate cases, it is true that on ". . . issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.,* 422 U.S. at 425. While the *Danner* result certainly seems

incongruous in cases involving proof of class discrimination, the *Sprogis* result not only circumvents the Rule 23 procedure but may be unfair as well. Under *Sprogis*, if plaintiff prevails, the entire "class" benefits; but if plaintiff fails, none of the members of the "class" are bound. As then Circuit Judge Stevens pointed out in dissent in *Sprogis:*

> "A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." 444 F.2d at 1207

The Eighth Circuit has not specifically addressed this question, and it is unnecessary for this Court to resolve the issue at this time. It is worth noting, however, that the problems inherent in either approach evaporate if a class action is certified. Avoidance of such unjust or anomalous results is itself a cogent reason for certifying Title VII class actions in the absence of peculiar or exceptional circumstances indicating that the class action form would be improper.

Title VII class actions are best suited for treatment under Rule 23(b) (2), since discrimination under Title VII is by nature action or inaction with respect to the entire class and since Title VII's remedies, including the award of back pay, are all equitable in nature. *See, Rich v. Martin Marietta Corp.*, 522 F.2d 333, 341 (10th Cir. 1975) (and cases cited). While some courts hold that the remedy of back pay may be granted under a (b) (3) class, *id.*, this Court finds the better view to be that the entire Title VII case should be governed by (b) (2) and not (b) (3). *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d

239, 252-53 (3rd Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975); *Jones v. United Gas Improvement Corp.,* 68 F.R.D F.R.D. 1, 22 (E.D. Pa. 1975); *Sagers v. Yellow Freight System, Inc.,* 529 F.2d 721, 736 (5th Cir. 1976); *cf., Arkansas Education Association v. Board of Education, supra,* 446 F.2d at 768-69. This procedure accords with the purposes of Title VII, which contemplates a full inquiry into defendants' conduct and resolution of the issues of liability and remedy in a single, comprehensive proceeding. Under 23(b) (2) no members of the class may "opt out," *United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d 826, 878 (5th Cir. 1975); *Wetzel, supra.* and the Rule 23(b) (2) procedure thus has a "superior" *res judicata* effect and protects defendants from the risk of repetitive litigation. This superior *res judicata* effect is also beneficial to the Court in its determination of appropriate back pay awards. Under Title VII, the Court must carefully articulate the reasons which justify a denial or grant of back pay. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 421 n.14. This exercise of discretion should be informed by a comprehensive view of the setting of the case and obviously can better be exercised in the context of the original Title VII action rather than in a series of individual suits seeking back pay. If this suit is appropriate for class treatment, it should be certified as a class action under Rule 23(b) (2).

(3) *Legal principles underlying Rule 23(a) (4),*

Despite the universally recognized principle that Title VII actions are peculiarly well suited to class treatment, it is nonetheless true that not all Title VII cases are appropriate class actions. There may be "peculiar circum-

stances" justifying the withholding of class certification, as when the discrimination complained of is unique to the individual, or when the named plaintiff is an inadequate class representative. *Wright v. Stone Container Corp., supra*, 524 F.2d at 1062.

The requirement of Rule 23(a) (4) is crucial to the proper application of Rule 23 as a whole. Where an entire class will be bound by the judgment in the action, placing the fate of the class in the hands of an inadequate representative is plainly repugnant to due process. *Hansberry v. Lee*, 311 U.S. 32 (1940). Effectuation of the social policies embodied in Title VII does not permit dilution of the due process rights of absent class members. Judge Godbold's admonition, stated in his special concurrence in *Johnson v. Georgia Highway Express, Inc.*, 417 1122, 1126, 1127 (5th Cir. 1969), is well taken:

> "It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?
>
> * * *
>
> "[W]hen the problem [of due process to the employee] is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy."

Even in Title VII cases, the Court must carefully scrutinize the adequacy of plaintiffs' representation of the class.

"Developments in the Law: Employment Discriminaiton and Title VII of the Civil Rights Act of 1964," 84 Harv. L. Rev. 1109, 1220-21 (1971); *EEOC v. Detroit Edison Co., supra,* 515 F.2d at 311.

Rule 23(a) (4)'s requirement of fair and adequate representation embodies two essential elements: (1) plaintiffs must be represented by competent counsel who will energetically pursue the action; and (2) named plaintiffs must not possess interests which are antagonistic to the interests of the class. *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2nd Cir. 1968). There is no doubt in this case that plaintiffs are represented by able and vigorous counsel, and the Court so finds. The issue is antagonism.

The general law of antagonism is set forth in *Redmond v. Commerce Trust Co.,* 144 F.2d 140, 151 (8th Cir. 1944), *cert. denied,* 323 U.S. 776 (1944) (hereinafter *Redmond).* Representation is inadequate,

> " . . . when there is antagonism *of interests* within the alleged class as to the subject matter. *But this antagonism must be as to the subject matter of the suit."* (Emphasis supplied.)

See also, 7 Wright & Miller, *supra,* § 1768 at 638-39 and cases cited at n.90. *Redmond* is the "leading case" on this question; it is unquestionably the law of this Circuit *Arkansas Education Association v. Board of Education, supra,* 446 F.2d at 767. (employment discrimination).

The clearest case for application of the *Redmond* rule is where the interests asserted by the class representative directly conflict with the economic interests of the class, and the rule has been uniformly followed in this situation. *Maynard, Merel & Co. v. Carcioppolo,* 51 F.R.D.

273, 277-78 (S.D. N.Y. 1970); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1116-17 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207-208 (D.D.C. 1969).

Decertification of class actions is not appropriate, however, when the evidence of antagonism is weak, or when the potentially conflicting interest of the representative party will not interfere with the representation of those interests as to which there is no conflict. *Knuth v. Erie-Crawford Dairy Coop. Association*, 395 F.2d 420, 428 (3rd Cir. 1968); *Mersay v. First Republic Corporation of America*, 43 F.R.D. 465, 468-71 (S.D. N.Y. 1968); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc.*, 52 F R.D. 335, 342-44 (D. Minn. 1971) (Neville, J.).

While the question of antagonism properly focuses primarily on the interests actually asserted in the lawsuit, courts have not overlooked the possible existence of ulterior motives held by the representative party which may work prejudice upon the absent class members.

> "Thus, although the Court is interested in the adequacy of representation, and not the motive for such representation, should any 'ulterior' motives of plaintiffs which are inimical to their ability to adequately represent the other shareholders become manifest, the Court is free to make appropriate adjustments." *First American Corp. v. Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970).

In *duPont v. Wyly*, 61 F.R.D. 615, 622-24 (D. Del. 1973) (hereinafter *duPont*), the Court ordered that the action not proceed on a class basis, in part because of plaintiff's apparent desire to "wage war" on one of the defendants.

The precedential value of this holding on the issue of motive may be questionable for two reasons. First, the question of motive was an alternative ground for decision. The other basis for decertification concerned a " . . . direct and specific conflict . . ." (a ground which alone is obviously sufficient to justify decertification), and the existence of this direct conflict was clearly the Court's primary concern. Second, the *duPont* Court doubted that *Redmond* meant what it said. In this Court's view, *Redmond* does mean what it says and represents the prevailing and correct view as to antagonism. Nonetheless, the *duPont* decision points out important considerations relating to the question of motive. The problem of antagonism is generally remedied by formation of subclasses, inviting intervention, or through the exercise of additional powers lodged in the Court by Rule 23. However, these supervisory powers are not without limitations. In assessing the adequacy of a party's representation, the Court should take account of the practical limits of its supervisory powers and should consider whether a party's motives are likely to influence his conduct of the litigation in a manner inconsistent with the interests of the class and in a manner not susceptible to effective control by the Court. If the ulterior motive is truly dominant and poses a genuine threat to class interests, the class may be decertified. *First American Corp. v. Foster, supra.*

Questions concerning Rule 23(a) (4)'s antagonism element have arisen quite frequently in class action suits involving union members or groups of employees. These cases have " . . . led to widely divergent results," and it often appears that decision has turned . . . on the factual setting of the case." *Gates v. Dalton*, 67 F.R.D. 621, 630

(E.D. N.Y. 1975). While the cases are fact specific to a large degree, the Court finds that the general principles applicable in the nonunion setting have for the most part been adhered to in the union/employee class cases.

It is clear that when an employee asserts a claim which is directly antagonistic to the economic interests of the class, a class action is inappropriate. *Phillips v. Klassen*, 502 F.2d 362, 366-67 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974); *Carroll v. American Federation of Musicians of the United States and Canada*, 372 F.2d 155 (2nd Cir. 1967); *Associated Orchestra Leaders v. Philadelphia Musical Society*, 203 F. Supp. 755, 757 (E.D. Pa. 1962); *Sheridan v. Liquor Salesmen's Union, Local 2*, 60 F R.D. 48, 52 (S.D. N.Y. 1973); *Northwestern National Bank v. Williamson*, No. 4-73-Civ. 24 (D. Minn., May 20, 1975) (class action nonetheless maintainable in peculiar circumstances since all those opposed to asserted class interest were adequately represented by defendant). The decisions are somewhat divided as to the propriety of class treatment when the class is sharply divided over the relief which plaintiff seeks when such relief here is not directly antagonistic to the concrete interests of the class. In a number of older decisions the existence of conflicting views regarding the relief requested has led courts to order that cases not proceed as class actions. *Giordano v. Radio Corporation of America*, 183 F.2d 558, 560 (3rd Cir. 1950) (legality of expulsion from union of plaintiff and his associates). *Gray v. Reuther*, 99 F. Supp. 992 (E.D. Mich. 1951), *aff'd per curiam*, 201 F.2d 54 (6th Cir. 1952) (reinstatement in the union); *Cox v. Hutcheson*, 204 F. Supp. 442, 446-47 (S.D. Ind. 1962) (injunctive claim under Labor-Management Reporting and Disclosure Act). How-

ever, more recent decisions evidence a flexible approach toward this problem. In *Rota v. Brotherhood of Railway, Airline & S.S. Clerks,* 64 F.R.D. 699, 706 (N.D. Ill. 1974) (rescission of a dues increase), a conflict regarding the relief requested did not preclude class treatment, since the position of those union members who opposed plaintiff's claim was adequately represented by the defendant unions. The *Rota* Court relied on *Dierks v. Thompson,* 414 F.2d 453 (1st Cir. 1969), as did this Court in *Northwestern National Bank v. Williamson, supra.* The Court in *Gates v. Dalton, supra* (dues increase), followed a different approach. The Court noted that disagreements concerning the relief sought might pose a ". . . sufficient, genuine conflict . . ." such that the class should be decertified. *Id.,* 67 F.R.D. at 631. Nonetheless, the Court declined to accept at face value a membership vote retroactively approving the dues increase. Rather, the evidence of alleged antagonism was subjected to "close scrutiny," and the Court found that the record did not demonstrate a clear and genuine conflict between plaintiff and the class. This approach is entirely consistent with Judge Wisdom's analysis of an antagonism issue presented in *Rodriguez, supra,* 505 F.2d at 50-51, where the Court found that a membership vote opposing the relief plaintiff sought did not clearly reflect the actual preference of the class. The Court went on to note that even if the vote were accepted at face value, the evidence of antagonism would not justify dismissal of the class action. The trial court could have shaped the class to avoid antagonism. Alternatively, where the only antagonism related to the relief sought.

> " . . . the court could have *shaped the relief* to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII, [citations omitted]. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day." *Id.*, 505 F.2d at 51.

Gates v. Dalton and *Rodriguez* not only indicate that seeming antagonism as to the relief sought may not be dispositive of the (a) (4) issue, these cases also demonstrate a sound and realistic assessment of the evidentiary weight to be accorded votes taken at union meetings. The percentage of the membership attending such meetings may not be large. The Court should not lightly assume that the vote of a fraction of the members reflects the views of most. *Gates v. Dalton, supra* (7/48). Moreover, the composition of those voting may not be congruent with the class, *id.*, *Rodriguez, supra*, and this fact casts further doubt on the reliability of evidence based on votes. This Court agrees that when the evidence of antagonism rests on contrary membership votes, such evidence " . . . should be nothing short of clear and convincing." *Gates v. Dalton, supra,* 67 F.R.D. at 632.

The rule that antagonism must relate to the subject matter at issue has been almost uniformly followed and has been adhered to by this Court. *Buchholtz v. Swift & Co.*, 62 F.R.D. 581, 597 (D. Minn. 1973). The mere existence of internal union dissension or factionalism does not of itself defeat maintenance of a class action. *Rota v. Brotherhood of Railway, Airline & S.S. Clerks, supra,* 64 F.R.D. at 706. In *Dawson v. Delaney*, 189 F. Supp. 416, 419 (D. Del. 1960), the membership was sharply divided as to whom should be elected officers of the Local. However,

there was agreement that a trusteeship should be removed and an election held, and this was the subject matter of the lawsuit. The existence of an underlying but separate political conflict was found to be immaterial as to whether plaintiffs could represent the class. In *Sheridan v. Liquor Salesmen's Union, Local 2, supra,* plaintiffs, members of a "political clique," had raised a "furor" within the union in the course of their campaigns for elective office. Although the Court took note of this conflict and of the fact that plaintiffs had been unsuccessful in seeking office, the Court recognized that this factor ". . . is only entitled to slight weight . . . ." *Id.,* 60 F.R.D. at 54.

The Court in *Sheridan, id.,* suggested that since some members of the class were union officers or agents, a class action would be improper because:

> " . . . [n]o such person should be part of a class action where he is, in effect, complaining of his own actions, or wrongs committed against the class, to which he was a party." *Id.,* 60 F.R.D. at 55.

To the extent that union officers are merely members of the unnamed class, this difficulty is not insurmountable, for a class can be easily fashioned which excludes such persons as members and avoids any inherent conflicts of interest. More fundamentally, this Court does not believe that union officers or former officers are necessarily disenabled from serving as named representatives when the interests asserted are solely those of the union member *qua* employee and not those of the union member *qua* officer. The Court in *Lynch v. Sperry Rand Corp.,* 62 F.R.D. 78, 82 (S.D. N.Y. 1973), so held, despite a finding that the union itself was prevented from acting as a class

representative because of serious potential conflicts of interest. *Cf., Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra; Mersay v. First Republic Corporation of America, supra.*

The mere fact that members of the class may not consider it wise to sue the union is immaterial. *Gates v. Dalton, supra,* 67 F.R.D. at 631. This position is particularly important in Title VII actions, for the Eighth Circuit has recently stated that the failure of a plaintiff to join the relevant unions as defendants cast doubt on the adequacy of the class representative. *Wright v. Stone Container Corp., supra,* 524 F.2d at 1062. Unions are by nature political entities. Political differences within unions are not uncommon; nor is it uncommon for union members to oppose as disloyal the bringing of actions against the union. If these factors were sufficient to justify decertification under Rule 23(a) (4), the class representative would often be confronted with an impossible choice. Where there were divisions within the union, the representative could forego suing the union, but this decision might itself brand the representative as inadequate. Alternatively, the union could be joined as a defendant, but if generalized and undifferentiated displeasure with this course were legally sufficient to characterize the representative as inadequate, the class action again would fail. This "Catch 22" would foreclose class actions against both the union and the employer. The result would be irrational and inefficient and would severely undermine the effectiveness of Rule 23 in advancing the important social policies embodied in Title VII. This Court eschews such a course.

These Rule 23(a) (4) principles may be summarized as follows: (1) the antagonism which will defeat main-

tenance of a class action must relate to the subject matter in controversy, as when the representative's claim conflicts with the economic interests of the class; (2) disagreements as to the remedy do not necessarily defeat a class action, especially in Title VII cases where the Court has broad powers in fashioning appropriate remedies; (3) the mere existence of political divisions or factionalism within a union does not require class decertification; (4) disagreements as to the wisdom of a union member's suing the union are not a proper basis for decertification; (5) union officers are not necessarily disenabled from suing on behalf of union members when the interests asserted are solely the interests of members and employees; (6) evidence of antagonism based on membership votes should be carefully scrutinized and should be clear and convincing; and (7) while questions of motive are secondary, the Court should be cognizant of the limitations of its supervisory powers and should be sensitive to the possible existence of ulterior motives which might jeopardize the interests of the class.

(4) *Application of Rule 23(a)(4) principles in this case*

The Court finds that the evidence of antagonism between named plaintiffs and the class is insufficient to justify class decertification. The first source of antagonism is remote in time and, more importantly, does not concern the subject matter at issue in this case. The dissension existing between 1968 and 1970 centered on the internal structure of the union. This was a political dispute, or a series of political disputes. At best this would be entitled to "slight weight." Since the source of antagonism is remote, and since plaintiffs prevailed on most of the disputed issues,

contrast, Sheridan v. Liquor Salesmen's Union, Local 2, supra, the Court concludes that these events are entitled to no weight whatsoever. The claim that plaintiffs demonstrably failed to protect the class in connection with the attempted raid is not persuasive. The raid itself is remote in time. The evidence that plaintiffs participated in or encouraged the raid is based on hearsay and is equivocal, and the sworn statements of both plaintiffs are to the contrary. Plaintiffs' testimony that they were required to take a "hands off" policy regarding the raid is unrebutted. Plaintiff Ambrose's activity in attempting to inform members of their rights is certainly remarkable, but if anything this course of conduct reflects an acute concern that members of the class be aware of and freely exercise their rights under the law and not an antagonism to class interests.

The second source of antagonism, an inherent conflict of interest stemming from plaintiffs' status as former union officers, is more troubling. In a sense this conflict does relate to the subject matter in controversy, *viz.*, the Local's liability for discriminating against its female members. The problem, of course, is that plaintiffs may be wearing two hats at trial: one as former union officers defending their actions, and a second as employee/members complaining of the inaction of their union. However, the extent of the conflict of interest in this situation is not clear. The conflict appears to exist only as to one defendant. As to this defendant, the conflict relates only to a two year period and relates only to the issue of liability. The question of liability spans the entire period from the enactment of Title VII to the present and, since plaintiffs allege continuing violations, will extend to the time of trial. It is not

at all clear that evidence bearing on liability from 1968 to 1970 will be necessary or important for assertion of the class claim against the Local. The conflict alleged is solely an inherent one. The likelihood that plaintiffs might themselves be liable to the class is utterly remote and speculative. The record contains no evidence which would point toward such liability. *Cf., Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra,* 52 F.R.D. at 341-42. The Court is satisfied that plaintiffs will vigorously advance the interests of the class and that the conflict of interest identified by defendants will not detract from the prosecution of the class claims. The fact that plaintiffs may be required to testify at trial in dual roles should not prejudice the class. There is no right to jury trial in Title VII cases, and thus there is no danger of jury confusion. This Court is presumptively capable of segregating that testimony which is offered on behalf of the employees from that which is elicited in defense of the union. Plaintiffs. if called to testify for the union, must answer truthfully regardless of their status as representative parties. and the Local's ability to defeat the class claim is not affected by plaintiffs' representative capacity. The Court concludes that plaintiffs' tenure as union officers does not preclude their representation of employee interests in this case. If anything, plaintiffs' prior experience in union affairs is likely to augment their adequacy as class representatives. *Buchholtz v. Swift & Co., supra,* 62 F.R.D. at 598.

The third source of antagonism, concerning plaintiffs' reaction to being removed from office and the filing of charges against the unions, does not relate to the subject matter in controversy. Defendants' argument focuses on motive, which the Court discusses below. It may be that

defendants, by arguing that this action is simply a personal vendetta, also mean to imply that plaintiffs' claim is without merit. Questions running to the merits of the case are not cognizable on a motion seeking class determination, as defendants admit. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974).

The expressions of class displeasure with plaintiffs' representation are inadequate evidence of antagonism for two reasons. First, the expressions themselves are highly unreliable. The vote taken at the union meeting occurred shortly after this suit was filed. Business manager Curley did attempt to explain the lawsuit to those present, but he was uncertain whether he had even read the pleadings at that time He erroneously explained that the lawsuit involves both racial and sexual discrimination. It is not at all clear what assumptions underlay the vote. *Rodriguez, supra.* The circumstances surrounding the signing of the petitions are even more obscure. Univac has a company rule forbidding the circulation of such petitions, and it appears that the signatures were executed in a clandestine environment It is unknown who circulated the petitions or what was said to the signators.

Neither the vote nor the petitions are congruent with the class. At the December 12 meeting 101 members were present; the vote was 83-0. Forty-one of those present were male.[*] A number of the petition signators were also males. Some signatures are duplicates; it is unknown how many signators also voted at the union meeting. While the precise number of class members who had opposed this suit is unclear, the proportion is roughly the same as that in *Gates*

[*]Ten members are recorded by first initials only; the sex of others, such as "Jan." "Jean" and "Pat," is unclear on the record. None of these is included in the Court's figure of 41.

v. Dalton, supra, where the Court found that the fractional vote was an unreliable indicator of class sentiment. This evidence of antagonism is a good deal less than clear and convincing.

The deposition testimony of plaintiffs, of business manager Curley, and of Douglas Boyce, provides no better evidence of antagonism. The plaintiffs admit that there is some opposition to their suit, especially among the union leadership, but they believe that most people support them. Mr. Boyce likewise believes that most of the women in his area support the plaintiffs. Mr. Curley, on the other hand, believes that opposition to plaintiffs is strong and widespread. All these opinions were based on hearsay, multiple hearsay and conjecture. These personal samplings of class opinion demonstrate little more than that there is some opposition to the suit among the class, the degree and nature of which is unknown.

The second difficulty with defendants' evidence of class antagonism is this: while the assumptions underlying the vote and the petitions are not known, the available evidence suggests that most objecting class members were simply upset with the fact that a union member was suing her own union. Although Mr. Curley stated that he did not know why each member voted against the suit in December 1974, he indicated that the primary issue discussed at that meeting was the fact that the Local was being sued by its own members. The minutes of that meeting reflect this concern:

> "Members questioned Pres. Curley on action that could be taken against these members (Helen Ambrose & Delores Elliot[t]) *for violating there* [*sic*] *oath*

> *as a member* & also what action could be taken to show that they do not support this suit.
>
> "Pres. Curley stated that the members should take any action on their own. The local is a defendant & should not try to influence the members." (Emphasis supplied.)

A great many of the petitions refer only to the fact that the Local is being sued and indicate that the signers do not wish to be party to such action. To the extent that defendants' evidence of antagonism reflects the view of class members that it is disloyal and improper for a union member to sue her own union, the antagonism is of a type which can have no bearing on certification of a Title VII class.

It is unclear to what degree, if any, the alleged class antagonism extends beyond this generalized displeasure. Moreover, there is no evidence that the class believes that the claims advanced here conflict with the concrete interests of the class. There is no evidence that the class is opposed even to the relief sought, except perhaps insofar as relief may involve the Local. At best, it appears that certain class members may be opposed to the named plaintiffs acting as representative parties. Since this antagonism seems to stem from political differences and from a feeling of disloyalty and has nothing to do with the subject matter of this lawsuit or the interests of the class in this lawsuit, and since the evidence of even this antagonism is less that clear, the fourth source of antagonism is not a basis for class decertification.

The fifth source of conflict of interest, like the third, poses the problem of motive. It is not unlikely that plain-

tiffs will participate in the political affairs of their union, and it is not inconceivable that plaintiffs will attempt to pursue this action so as to advance their political purposes. The Court's supervisory powers are not perfect, and this is particularly true in relation to plaintiffs' acceptance or rejection of settlement offers which may or may not be beneficial to the class. *duPont, supra.* Additionally, even if plaintiffs *actually* possess no dominant ulterior motives, there is a danger that the class itself will *perceive* this lawsuit as merely a vehicle for advancing plaintiffs' personal and political goals. Such a perception could threaten plaintiffs' ability to pursue class interests, for suspicion on the part of the class might foreclose access to sources of proof. For example, if class members feel that this action is alien to them, they might refuse to provide the Court with the information necessary to determine appropriate back pay awards, relinquishing rights which might have been asserted were the class representative more personally compatible with the class.

The problem of ulterior motives, and of class perception of motives, does not warrant decertification at this time. As noted above, the evidence of present class antagonism or suspicion is far from clear. Since the Court finds that some notice to the class will be necessary under Rule 23(d) (2), *ante,* it will be possible at that time to determine the degree and nature of antagonism and to judge the appropriateness of intervention by additional class members, whose presence as named parties could obviate the danger of perceived antagonistic motives.

The supervisory powers vested in the Court are not all-encompassing. However, in the task of protecting the class from conflicting interests or ulterior motives, the Court

does not stand alone. Counsel for the class are officers of the Court. When attorneys undertake representation of a class, each member of the class becomes a client. The representative party's attorney thus owes a duty of loyalty, and a duty of zealous representation not only to the named party but to all absent parties as well. This Court is of the view that if the named parties in this case attempt to manipulate the conduct of this action so as to further their solely personal interests, or if the representative parties take any action which is inimical to class interests or poses a danger of potential conflict of interest with the class, counsel's ethical obligations to their class clients and to the Court would require corrective action and disclosure to the Court.[3] Such responsible action by counsel is essential to make Rule 23 function efficiently and fairly. In the Court's view, the strict *Redmond* rule is premised on the belief that courts can rely on counsel to prevent ulterior motives or other considerations not bearing on the subject matter in controversy from affecting the prosecution of common legal interests. The teaching of *Redmond* suggests that a class action should not be decertified because of concerns bearing on ulterior motives except in exceptional cases, as where the ulterior motive is so clearly dominant that it is doubtful that the attorney for the class will be able to control the named party, *cf., duPont, supra,* or where counsel has demonstrably failed to exercise effective control

To date the common interests of the class have been diligently pursued by the named parties and their attorneys.

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[3]Plaintiffs could have sued in their individual capacities, and had they done so they would have been entitled to pursue their legal interests in a manner consonant with their ulterior motives, if any. In representing a class, however, the named parties and their counsel are required to look only to the common legal interests of the class.

The problem of motive looks to the future; the danger is speculative. The Court cannot say that its supervisory powers under Rule 23 will be inadequate to cope with any problems of ulterior motive which may develop and as to which the Court will be appropriately appraised by counsel for the class.

In sum, in this Title VII action plaintiffs assert legal interests which are common to the entire class and seek relief which will inure to the benefit of the entire class. The Court perceives no concrete or direct conflict between plaintiffs' interest under Title VII and the interests of class members. Plaintiffs and their counsel have vigorously represented the class thus far, and the Court is satisfied that they will continue to do so. The conflicts of interest identified by defendants are tangential and are almost entirely immaterial to the issues posed in this case. Heretofore, these conflicts have not prejudiced class interests. Should genuine conflict arise in the future, the Court, being advised by counsel for the class, may remove any antagonism or, if necessary, decertify the class.

III. *CERTIFICATION OF APPROPRIATE CLASS, NOTICE, AND PARTIES.*

Plaintiffs satisfy the prerequisites of Rule 23(a), and this action shall be certified as a class action under Rule 23(b) (2). Such certification is conditional. Since broad injunctive and declaratory relief is often appropriate in Title VII cases, a class including both former and future employees and union members is appropriate. The Court believes that including within the class those who "would have" become employees is unnecessary for granting whatever relief may be necessary and would constitute an over-

ly vague class definition. The class shall be defined as former, present and future employee/union members.

Since this action shall proceed as a class action, it is appropriate and consistent with the Court's duties under Rule 23 to provide the parties with some direction. The Court finds that some notice to class members who may be entitled to back pay should be provided under Rule 23(d) (2). This conclusion rests on two grounds. First, it appears that the award of back pay may turn on ". . . the equities of individual cases . . . ." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 413. The determination of back pay awards should be made on an individualized basis. *Johnson v. Goodyear Tire and Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974), and such a decision should follow notice directed to the class. *Williams v. Local No. 19, Sheet Metal Workers International Association,* 59 F.R.D. 49, 56 (E.D. Pa. 1973). While " . . . experience teaches that such notice may come late in the litigation . .." *United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 878, a second consideration indicates that earlier notice is appropriate in the present case. Although the evidence of antagonism in this case is not of a type which justifies class decertification, there are legitmate grounds for concern that some, and perhaps many, class members may be opposed to the conduct of this suit by the named parties and that such members of the class might abandon their potential claims for back pay simply because of the identity of the representative parties. Although the Court is powerless to prevent class members from foregoing the assertion of their legal rights, reasonable steps should be taken to determine the degree and nature of class antagonism so that measures may be fash-

ioned for reducing such antagonism. The (d) (2) notice procedure is an appropriate mechanism for exploring problems of antagonism, reducing confusion within the class, and formulating necessary orders. 7 and 7A, Wright & Miller, *supra,* § 1768 at 651, § 1793 at 209-210 The parties should proceed with discovery not only as to the merits but also for the purpose of defining an appropriate back pay class and determining the names and current mailing addresses of such class members. When such discovery is complete, the parties should submit to the Court proposed notices. At the least, the notices should concisely explain the nature of this lawsuit, explain that all persons will be bound by the judgment in this case, explain that the recipients may at some future date be entitled to an award of back pay, enumerate those types of evidence which the employees should retain for proof of their back pay claims, and elicit responses on the issue of antagonism. These responses should seek information as to the following: (1) whether the recipient is opposed to this lawsuit; (2) if there is opposition, what the source of that opposition is; (3) whether the recipient would desire to intervene in this case either with her own counsel or with counsel presently representing the class; and (4) if there is opposition and if the recipient does not wish to intervene, whether the recipient would wish to see other class members intervene, and, if so, whom the recipient feels would be appropriate intervenors. The cost of such notice must be borne by the class representatives. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at 177-79.

The Court notes that the EEOC "right to sue" letter attached to the complaint appears to name only the Local as a respondent. The caption is somewhat ambiguous, and

it is not inconceivable that the International as well as the Local was charged before the EEOC. However, if only the Local was a respondent, there may be an impediment in this case to the granting of complete relief. Plaintiffs complain of discrimination on the part of all three defendants. Where unions are guilty of discrimination, they must be joined as defendants. *Gilmore v. Kansas City Terminal Railway Co., supra,* 509 F.2d at 52-53. When non-joinder threatens to frustrate a Court's exercise of Title VII remedial powers, the Court may act *sua sponte* to order the unions joined, as did the Eighth Circuit in *Gilmore.* However, it may be necessary for administrative charges to have been filed with and processed by the EEOC before a proper joinder may be effectuated. *Norman v. Missouri Pacific Railroad,* 414 F.2d 73, 84-85 (8th Cir. 1969); 42 U.S.C. § 2000e-5(f(1) (". . . a civil action may be brought against the respondent named in the charge . . ."). If plaintiffs have not heretofore brought a charge against the International before the EEOC, they should do so immediately.

IT IS ORDERED:

1. That defendants' motions that this case not proceed as a class action are granted as to plaintiffs' claims arising under the Back Pay Act and as to plaintiffs' claims for breach of the duty of fair representation and for breach of contract. Said motions are denied as to plaintiffs' Title VII claims.

2. That plaintiffs' motion for class certification is denied as to plaintiffs' Back Pay Act, breach of duty of fair representation and breach of contract claims. Said motion is granted as to plaintiffs' Title VII claims.

3. That the Title VII class is hereby conditionally certified and is defined at this time to include former, present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and who are, have been, or will be members of defendants Local and International, for the period commencing on July 2, 1965, and continuing to the date of trial.

4. That denial of plaintiffs' motion for certification of a class action as to the duty of fair representation/breach of contract claims is conditional. Denial of said motion with respect to the Back Pay Act claims is not conditional.

5. That the parties, in addition to proceeding with discovery on the merits, also pursue such discovery as will identify the names and current mailing addresses of class members who may be entitled to an award of back pay under Title VII.

6. That upon the completion of such discovery, the parties submit to the Court proposed forms of notice to be mailed to members of the class pursuant to Rule 23(d) (2).

May 27, 1976.

/s/ Earl R. Larson
United States District Judge

NOTICE OF CLASS ACTION
PLEASE READ THIS CAREFULLY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose and all persons similarly situated,

Plaintiffs,

vs

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

No. 4-74 Civil 627

TO: PLAINTIFFS AND CLASS MEMBERS

There is pending in the United States District Court for the District of Minnesota, Fourth Division, a class action lawsuit against Sperry Rand Corporation, the International Brotherhood of Electrical Workers (IBEW), and Local Union No. 2047 of the IBEW, alleging that these defendants violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

This notice is directed to you because you may be affected by this litigation. The notice is not to be understood as an expression of opinion by this Court as to the merits of any of the claims or defenses asserted. Rather it is given solely for the purpose of informing you of the pendency

of this action so that you may decide what steps you wish to take in regard to it.

The complaint in this lawsuit alleges that Sperry Rand-Univac, the IBEW and Local Union 2047 discriminate, and have discriminated in the past, in a number of ways against women at Univac's Twin Cities locations. The lawsuit seeks an Order from the Court forbidding the defendants from further discrimination and for an Order rectifying past discrimination to include the award of back pay and money damages.

The defendants have denied the allegations contained in the complaint and further deny any liability.

On May 27, 1976, the Court determined that plaintiffs Delores Elliott and Helen Ambrose were proper representatives of a class consisting of:

> "Those present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and who are or will be members of defendants Local and International, up until the date of trial; and those former female employees who were employed by defendant Univac at its plants in and near St. Paul, Minnesota, and who were members of defendants Local and International, on September 4, 1972, or thereafter."

All persons who fit within the above class definition and who do not request to be excluded from this action will be deemed members of the class, will be represented by the named plaintiffs in this action and will be bound by the judgment of this Court in the action, whether favorable or unfavorable to the class. In this regard, a questionnaire has been attached to this Notice. *Please read this*

questionnaire and return it to the Clerk of Court indicating appropriate answers in the spaces provided.

It may be necessary during the course of this litigation to provide the Court with certain information about your employment with Univac. Therefore, you should attempt to make a record or keep a record or other factual support for proof of (a) the job classification(s) you held during your employment with Univac; (b) the number of times and the dates on which you may have applied for other positions at Univac; (c) the dates of any changes in your position or job classification at Univac; (d) the date of your hiring and, if applicable, the date of your termination.

Please address any communications or inquiries you may have concerning the conduct of this action to the Clerk of Court, United States District Court, District of Minnesota, Fourth Division, P.O. Box No. 2230 Loop Station, Minneapolis, Minnesota 55402.

/s/ Earl R. Larson
EARL R. LARSON
UNITED STATES SENIOR DISTRICT JUDGE

Clerk of Court
United States District Court
P.O. Box No. 2230 Loop Station
Minneapolis, Minnesota 55402

Re: Delores Elliott, Helen Ambrose, and all other persons similarly situated v. Sperry Rand Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047, I.B.E.W. No. 4-74 Civil 627.

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Ambrose Helen M. 000003271
3528-27th Ave. S.
Mpls. Minn. 55406

BEFORE COMPLETING THIS QUESTIONNAIRE READ THE NOTICE ATTACHED.

1. Do you favor or oppose this lawsuit being brought on your behalf by Delores Elliott and Helen Ambrose?

   (Mark X indicating your choice.)

   I favor this lawsuit————
   I oppose this lawsuit————

2. If you answered "I oppose" to question (1) above, please set forth below the reason for your opposition.

3. Do you wish to participate as a member of the class in this lawsuit and be represented by the attorneys for the class?

   Yes ———— Nc ————

4. Do you wish to participate in this lawsuit with your own attorney?

   Yes ———— No ————

5. If you do not wish to participate but desire that others participate, please specify the names of these other individuals.

EXCLUSION REQUEST

(COMPLETE THIS PORTION *ONLY* IF YOU DESIRE TO BE EXCLUDED FROM THE CLASS IN THIS LITIGATION.)

6. I acknowledge receipt of the notice attached and wish to be excluded from this litigation.

Date: ————, 1979.

————————

AFTER YOU HAVE ANSWERED THE QUESTIONS ASKED ABOVE, PLEASE PROVIDE THE FOLLOWING INFORMATION AND RETURN THIS QUESTIONNAIRE BY AUGUST 6, 1979.

Date: ————, 1979.

Name: ————————

Address: ————————

————————

QUESTION NO. 4: How much of any money damages awarded to Delores Elliott and Helen Ambrose on behalf of the class might the IBEW and Local 2047 be responsible for?

ANSWER: This would be determined by the Court after hearing all the evidence. Until all the evidence is heard,

it is difficult to say. It is possible, however, that the International and Local Unions might be held responsible for a portion of any back pay and money damages awarded.

QUESTION NO. 5: How would the IBEW and Local 2047 pay any back pay of money damages for which they are held responsible?

ANSWER: The IBEW would attempt to pay its share out of its own funds as available. Local 2047 would attempt to pay its share out of its own funds and if its own funds on hand were insufficient, it is possible that the Local Union could, by secret vote of its membership, assess all of its members to cover its share.

QUESTION NO. 6: How will this case affect me as an employee of Sperry Rand and as a present or past member of the International Union and the Local Union?

ANSWER: If the plaintiffs establish sex discrimination, the Court has the power and the authority to issue an Order forbidding further discrimination and to award back pay and money damages. You would be covered by the Court's Order forbidding further discrimination. If you are determined to have been discriminated against, you may also be entitled to back pay and money damages.

At the same time, as a member of the Local Union, it is possible that you might be assessed some amount of money, as a result of a secret vote by the Union membership, to help the Local Union pay its share of any back pay or money damages for which it is held responsible.

Regardless of the outcome of this lawsuit, neither Sperry Rand nor the Local Union has any right to fire, demote or otherwise terminate your employment with the Company or your membership in the Local Union as a

result of any activity or conduct on your part in this lawsuit.

If you have any further questions or other communications pertaining to the matters discussed above, please address those questions in writing to:

Clerk of Court, United States District Court
P.O. Box 2230 Loop Station
Minneapolis, Minnesota 55402

Please be sure to include your name and address in any correspondence with the Clerk of Court.

SETTLEMENT NOTICE

A copy of the Stipulation of Settlement and other papers relating to this lawsuit are on file with the Clerk of the United States District Court, 110 South Fourth Street, Minneapolis, Minnesota. You may inspect these documents at the Clerk's office between 8:30 am. and 5:00 p.m., Monday through Friday.

The Court must approve this settlement. The Court has scheduled a hearing to be held on July 27, 1981, at 9:00 a.m. at the United States Courthouse in Minneapolis to determine whether the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

You are entitled to object to all or any part of the settlement and to have your objection ruled upon by the Court. IF YOU WISH TO OBJECT TO THE APPROVAL OF THIS SETTLEMENT, YOU MAY APPEAR AT THE HEARING AND SHOW CAUSE, IF ANY, AS TO WHY THE SETTLEMENT SHOULD NOT BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE AND WHY THIS ACTION SHOULD NOT BE DISMISSED ON THE MERITS AND WITH PREJUDICE AS TO DEFENDANTS.

If you wish to object to the settlement, your objection must be submitted in writing to the Court and must be received by the Court no later than July 20, 1981. Your objection should be mailed to:

Clerk of United States District Court
110 South Fourth Street
Minneapolis, Minnesota 55401

with copies mailed to:

J. Richard Bland, Esq.
Bradley M. Jones, Esq.
2250 IDS Center
Minneapolis, Minnesota 55402

David S. Doty, Esq.
Sally A. Johnson, Esq.
4344 IDS Center
Minneapolis, Minnesota 55402

Hyman Edelman, Esq.
William Z. Pentelovitch
1800 Midwest Plaza
Minneapolis, Minnesota 55402

James T. Hansing, Esq.
1208 Plymouth Building
Minneapolis, Minnesota 55402

You may consult and retain your own legal counsel if you desire. You may also address questions to:

J. Richard Bland, Esq. or
Bradley M. Jones, Esq.
2250 IDS Center
Minneapolis, Minnesota 55402
Telephone: (612) 338-0661

If you fail to object in the manner prescribed herein, you will have waived your objection, you will be bound by the Court's determination, and you will be foreclosed forever from raising an objection without special permission of the Court.

In the event that the hearing on this settlement does not resolve all questions or objections on July 27, 1981, the Court may order further proceedings to be held No further notice will be sent to you regarding any such continuations of the hearing or related proceedings unless ordered by the Court.

BY THE COURT

/s/ Earl L. Larson
United States District Court Judge

Dated: May 21, 1981

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
670 U. S. COURT HOUSE
MINNEAPOLIS, MINNESOTA 55401

March 27, 1985

CHAMBERS OF
EARL R. LARSON
Senior Judge

Mr. Robert D. St. Vrain,
Clerk, U. S. Court of Appeals
U. S. Courthouse and Customs House
1114 Market Street
St. Louis, MO. 63101

Re: Elliott, et al v. Sperry Rand, et al
4-74 Civil 627
#84-5183

Dear Mr. St. Vrain:

A response to the Ambrose letters of March 11 and March 17, 1985 should perhaps not be necessary.

Ms Ambrose states that the law firm of Lindquist & Vennum was identified at the start of the law suit as counsel for Teamsters Local Union No. 970. The law suit was filed in 1974.

I became a Judge in August 1961 and at that time completely severed my relationship with my former firm. I enforced a three year deadline during which time I took no cases involving my old firm. The firm continued as Lindquist, et al and in 1968 merged with Vennum et al and became Lindquist & Vennum. None of the Lindquist et al or Lindquist & Vennum lawyers who appeared before me after 1964 were in the Larson et al firm in 1961 or prior thereto.

I have no knowledge as to whether or at what point in time Lindquist & Vennum might have represented Local 970.

Ms. Ambrose refers to a statement in a Sperry Rand brief that I came to the bench with an extensive labor background. I practiced little, if any, labor law. Counsel for Sperry Rand may have been thinking of Leonard Lindquist with whom I started the firm in 1946. Mr. Lindquist has an extensive background in labor arbitration. Since 1961 I have been involved in a number of cases and disputes involving labor and management. This is true of all Judges. I feel that I have followed the law in the resolution of these disputes.

In the second letter Ms. Ambrose refers to two law clerks who later became members of the Hvass, et al law firm. Once a law clerk tells me of a decision to join a certain law firm I no longer permit the law clerk to do any work involving that law firm. For a period of three years I do not take any cases in which a former law clerk will participate.

Since 1970 Ms. Ambrose has been engaged in a series of attacks directed to her Local Union, the International Union, her employer, three of her law firms and now myself The Court of Appeals is the next likely target.

Sincerely,

/s/ Earl R. Larson
Earl R. Larson
Senior, U. S. District Judge

ERL/jcp
cc: Ms Helen M. Ambrose
3528 27th Avenue So.
Minneapolis, MN. 55406

LAW OFFICES
MESHBESHER, SINGER & SPENCE, LTD.
1616 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121

December 2, 1981

Ms. Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN 55406

RE: 45-(81-82)

Dear Ms. Ambrose:

I have enclosed a copy of a Hennepin County Bar Association Ethics Committee Rules, as you requested.

Committee members assigned to a particular case are asked to conduct an investigation, which involves receiving written materials from the parties and doing whatever follow up is necessary. The limitations on the investigation are set forth in the enclosed rules. I have questioned you and Ms. Elliott over the telephone to save time, but solicit all the information you can give me, in either written or verbal form

I have sent the respondent attorney's written submissions, and have summarized any additional oral responses that they have made.

After my presentation to the committee which first screens these matters, it was decided not to dismiss the case and to continue the investigation. I have received and reviewed the additional materials that you sent me. In addition, I contacted Charles Hvass, Sr., who gave me more information about his firm's representation of the Team-

sters. They did some work similar to the machinists and were initially concerned that the same kind of lawsuit might be made against them. Later, they concluded that there was no such possibility and told Hvass that they were comfortable with his representation of you.

I also asked Hvass about his representation of Doty's firm. Apparently, the representation had been concluded by the time he entered your case. He represented Doty's firm in a fee award result which was appealed to the Regional Federal Appeals Court. Hvass did not do the written work, but argued the case in St. Louis. He received a fee which had been set before he entered your case.

The investigation will continue with a second review before an Ethics Committee panel.

Your truly,

/s/ Carol Grant
Carol Grant
CG:kc
Enclosure
cc Ms. Delores Elliott

HANDWRITTEN AFFIDAVIT OF CLASS MEMBER JENNIE HODDER

Ms. Carol S. Grant, Atty.
1616 Park Avenue
Mpls., Minn.

Dear Ms Grant:

I, Jennie Hodder wish to give an affidavit that I was to have been called as a witness in the case No. 4-74 Civil 627.

My testimony was to be directed to the fact that I performed the same work as a Teamster Mechanical Inspector, as well as the same work in the I.B.E.W. General Inspector class, and that I was paid at a lesser rate of pay.

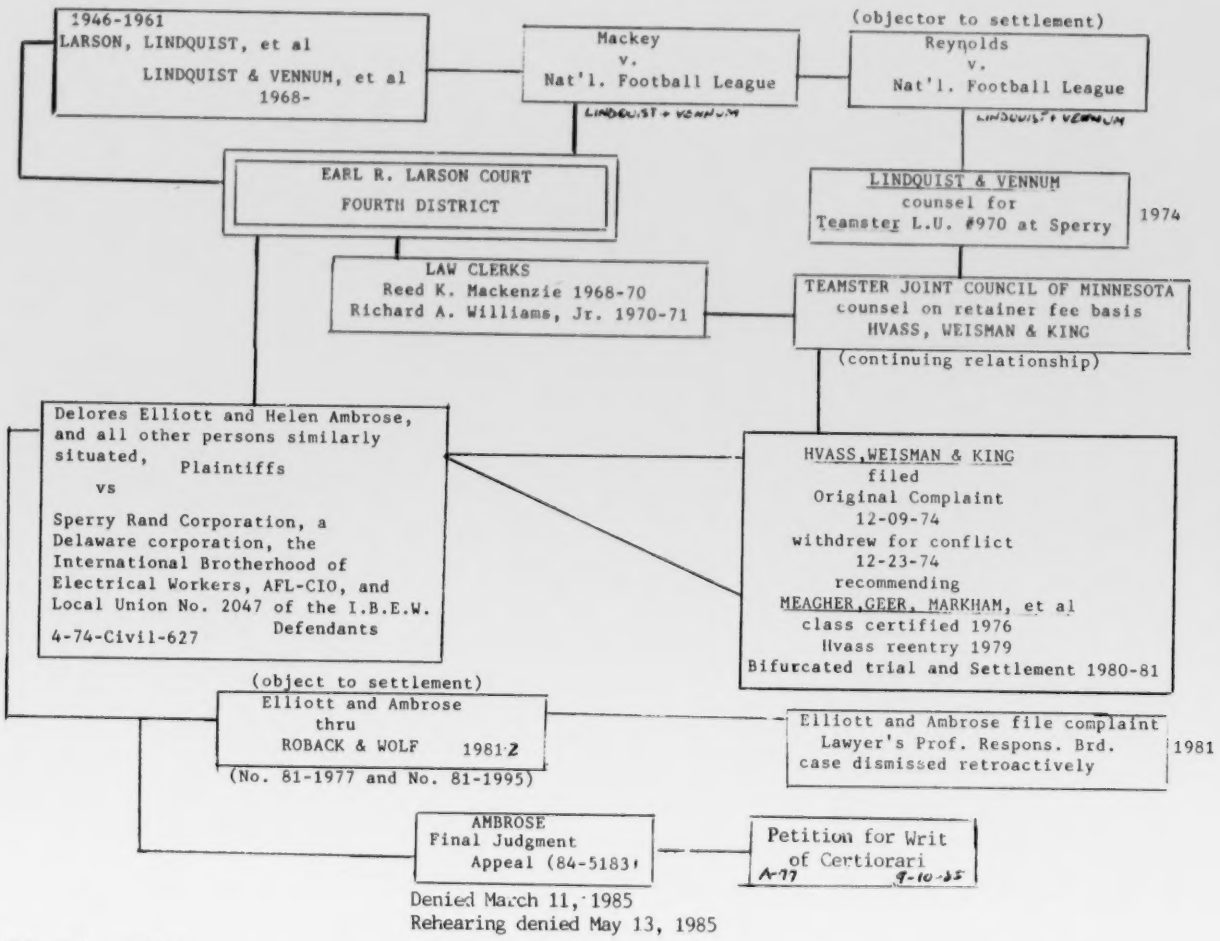
I wish to make it clear to you, that I had made that fact plain to Mr. Bland during the trial. I attended the trial daily except for the first week. Mr. Bland was aware of the intermingling of the Inspection classes these complaints were made to him during coffee and lunch breaks at trial. Mr. Bland failed to read, or acknowledge my written objection, at that it was directed to the fact I performed the same work as a Teamster Mechanical Inspector, and that I received a lesser rate of pay.

Sincerely,

Ms. Jennie Hodder
2436 Martin Way
White Bear Lake, Mn. 55110

On 13th day of March 1982
Notarized

INTERCONNECTING RELATIONSHIPS & PROGRESSION OF THE SPERRY/ELLIOTT CASE



Denied March 11, 1985
Rehearing denied May 13, 1985

H.M. Ambrose-1985

A-77

ETHICS COMM. LAWYER CAROL GRANT NOV. 17, 1981 FINDINGS AS TO HVASS CONFLICTS

November 17, 1981

The findings of Carol Grant of the Ethics Committee after initial investigation was predicated upon Disc. Rules and Cannons as follows;

DR 7-101 (a) (3), EC. 7-7, DR 5-105 EC. 5-19

"In light of these rules, I evaluate complainants' claims as follows:

1. Complainants acquiesced in Williams' presence during trial. They knew he was from the Hvass law firm. I, therefore, would dismiss this complaint.

2. Complainants apparently concede or at least can't dispute that they were in error about the sutstitution of Charles Hvass for Richard Bland during settlement negotiations.

3 Complainants have no proof to dispute the claim of Charles Hvass that he was asked to participate by his own associate Williams I do think representation of Doty should have caused Mr. Hvass to discuss the matter with complainants and withdraw upon request, per EC 5-19 and DR 5-105 (c). Thus, I believe there has been a violation of the disciplinary rules.

4. The Teamsters' conflict of interest was remote or non-existent and arguably falls outside the conflict of interest disclosure requirement. In any event, they objected, but it appears the objection was more in

the form of a question to Bland. It would have been desirable for Bland to relay this information to Hvass, so that Hvass could withdraw, but given the remote or non-existent nature of the conflict and weak objection, I recommend that this complaint be dismissed.

5. It appears that complainants expressed their desire to attempt (attend) settlement conferences but acquiesced in the strong recommendation that they not do so. Again, it might have been desirable for the lawyers to let plaintiffs attend, but I don't think the situation warrants discipline.

6. The lawyers may have been unduly harsh in stating their case for the proposed settlement, but I don't think they overstepped the bounds of propriety. The settlement was approved by Judge Earl Larson and apparently the proper procedures were followed in obtaining class acquiescence.

7. The attorneys apparently did obtain the job packets and determined they weren't too useful; therefore I dismiss this complaint."

JULY 30, 1981. FAIRNESS (FEE) HEARING
HVASS COMFLICTS

EXPLANATIONS BY BLAND, WILLIAMS AND HANSING (L.U. 2047 IBEW ATT'Y)

[188] THE COURT: Ms. Roback or Ms. Wolf—

MS. ROBACK: Your Honor, it is my understanding we are discussing the petition of the class attorneys for

fees and costs, and just making response to that petition we are not objecting to the Meagher, Geer firm's fees and costs, but would like to know on what hourly basis the firm is billing these attorneys' fees.

Secondly, we do object to the firm of Hvass, Weisman & King receiving attorneys' fees when they have not specified to the Court the time period these fees were incurred and also, due to the fact they did withdraw from the case before the Court due to conflict of interest and re-entered the case without the consent of the named plaintiffs or other class members. I would like to challenge the propriety of the award of attorneys' fees to this firm and to note to the Court that in the settlement itself and in the notice to the class, it is not noted that the Hvass firm is to receive the fees.

Also, where it lists the attorneys on the notice itself which did go to the class, there is no mention of the Hvass firm on this notice.

We will address our motion for attorneys' fees after any other objections have been made to Mr. Bland's motion. Thank you.

[189] THE COURT: Mr. Bland or Mr. Williams, as I remember there was this earlier conflict and you came back into the picture because the conflict no longer continued?

MR. WILLIAMS: Well, Your Honor, I will speak to that issue. What happened on the case was we never felt, actually, that there was a conflict of interest. Where the issue arose was an apparent conflict of interest which was raised by a Teamster organization which our office did not represent. However, we did represent Joint Council 32, the unbrella organization of which that particular

Teamster Local was a participant. When that Local raised the issue because they represented people on the mecahnical side of that same operation—they had a small bargaining unit—we advised the class representatives of the fact that this objection had been raised and since these people did contribute in part on a per capita to a retainer that our firm received from the Joint Council, and since the Joint Council, or this one Local was objecting, we advised them that under the circumstances we probably felt we might have to withdraw from the case, simply because of the appearance. We did not feel there was a conflict but there was an appearance of a conflict and it was our client that was objecting.

[190] It was at that time that we made arrangements to meet with other counsel on the case to see if they were satisfied with a particular firm taking over the matter. What happened was at some time later the Joint Council advised they did not feel this was a conflict of the nature that should keep us from participating in the case. It was at that time that we once again became reinvolved in the case with the Meagher, Geer office to help participate in the prosecution of the lawsuit. We came in after the issue went up to the Eighth Circuit on the issue of class certification and returned to this Court for trial.

That is the factual framework under which the withdrawal took place. I don't think it is fair to say there was a conflict of interest, and I know because I was present at some of the discussions that took place at that time. Mr. Hvass advised the class representatives—in fact, very carefully advised him that he did not view it as a conflict but there was the potential appearance of a conflict and the party raising it was a client of the office. That was the reason we left the case at that time.

However, as I pointed out, it was the party who raised the issue which later said, "No, don't worry [191] about it. You may participate in the case." The party having the right to raise the issue of conflict said "We don't view it as a conflict of interest."

THE COURT: Do you want to speak to your request, Ms. Roback?

MS. ROBACK: Our request for attorneys' fees?

THE COURT: Yes.

MR. WOLF: I didn't know if you wanted a response to what Mr. Williams said.

THE COURT: You may respond to what Mr. Williams said.

MS. WOLF: First of all, if there was enough of a conflict or they believed there was enough of a conflict to excuse themselves from the case initially, our clients still feel that they need to have a justification for why the Hvass firm re-entered the case and why until they appeared at the first day of trial, they were not aware that the Hvass firm had evidently been rehired.

Our clients do not object to any payments to the Hvass firm in the drafting of the Complaint in the initial lawsuit. They had retained them, they were pleased with that counsel. The question we have is from the documents submitted thus far by Meagher, Geer and the Hvass firm it is impossible to see—there is no [192] breakdown of hours on which charges are, let's say pre-trial and which are during trial or post trial. Those are the fees that our clients object to.

THE COURT: I believe everyone knows that Mr. Williams was here for much of the trial. He examined some of the witnesses as I recall and participated in cross-examination.

MS. WOLF: Our clients are not challenging the fact that Mr. Williams was here at trial. They saw him every day. The issue is, Your Honor, they feel that his representation or desire to represent them as part of class counsel was unauthorized and was without their knowledge. They don't understand how it was that he came to re-enter the lawsuit. Therefore, until that is explained we would like that portion of the fees to the Hvass firm to be withheld.

In other words, the first thing I am asking for is a breakdown of the fees that the Hvass firm is asking for so that we are able to distinguish the portion of fees before the Hvass firm declared a conflict of interest, approximately December, 1974. That portion of the fees we have no objection to.

The second issue is the portion of fees that occurred after the Hvass firm re-entered the case and proceeded to trial in approximately 1979. It is that [193] portion of the fees where our clients feel the issue needs to be clarified—how it was that the Hvass firm came to be reinvolved It is that portion of the fees to which they object.

THE COURT: Mr. Williams just explained that Ms. Elliott hired them in the first place. I know they are hiring more and more law firms. They hired you and Ms. Roback and I suspect they will be hiring more law firms.

MS. WOLF: Your Honor, I don't think that is the issue at all. The issue is not how many law firms Ambrose and Elliott have hired, Your Honor. They deserve to be represented as competently as possible.

THE COURT: My guess is they are going to be dissatisfied with you and Ms. Roback and will be back asking for more representation in this court.

MR. WOLF: I would like it on the record that we believe and our clients believe that is absolutely irrelevant to the issue.

MR. HANSING: Could I make a few remarks with reference to what Mr. Williams said.

I have been the attorney for Local Union 2047 of I.B.E.W. since about 1973 when I left the NLRB, and this suit was commenced in 1974. Some time after the suit was commenced it was brought to the attention of [194] the Local Union that the Hvass firm which was representing the plaintiffs at that time was the attorney for Teamsters Joint Council 32, which as Mr. Williams stated is the Minnesota unbrella organization for all Teamster Local affiliates in the State of Minnesota. One of the Teamster Local Unions affiliated with Joint Council 32, Teamster Local 970, had a small bargaining unit at Sperry Univac, and the bargaining unit consists of experimental, prototype people in an area, if I recall correctly, which was adjacent to the refurbishing area, and from time to time jurisdictional disputes erupted between Local Union 2047 and the Teamsters Local.

As you know, Local 2047 is a production and maintenance employee union, and Local 970 represents the experimental shop employees. If I recall correctly, Mr. Curley became indignant over the fact that the Hvass firm which represented the Teamsters was suing another Local Union which was not affiliated with the Teamsters. I think at some time maybe that concern was transmitted to either 970 or the Teamsters. I was not a party to it but that is my understanding in talking to Mr. Curley. I think at that point the Hvass, Weisman firm because of their sence of commitment or obligation to the Joint Council,

not to 970, desired to step aside from the case. At that time Local 970 was represented by Leonard [195] Lindquist's firm, Lindquist & Vennum. The Hvass, Weisman firm was not representing 970 at that time.

I can even give testimony that Hvass, Weisman has never represented 970 until recently. Lindquist & Vennum has been representing them, and it is my understanding that Robins, Davins & Lyons now represents 970.

MR. WILLIAMS: I would just like to clarify one thing, Your Honor. I think the facts that Mr. Hansing relates are accurate. I report to the Court that I was present when Mr. Hvass met with the named plaintiffs and explained to them the fact we didn't believe there was a conflict but we were faced with a claimed appearance of conflict by another client of the office, and under those circumstances with another client in the office making a claim of an apparent conflict of interest, we felt it was the responsible thing at that point in time, to try to get other counsel to continue the case. I want to emphasize that at a later point in time the very party raising the issue said, "We don't believe there is conflict of interest and have no objection to you participating in the case." That is why we became reinvolved in the case.

I don't want the Court to have a feeling there was any feeling in our office that there was an actual conflict of interest or that we were incapable in any way [196] representing the named plaintiffs in the case.

MR. HANSING: One other point, the class, Your Honor, includes all females who have been, are, or will be employed by Sperry Univac and who are members of the Local Union 2047, I.B.E.W. That class definition never

at any time included any other employees, including employees of the Teamster affiliate. So people in that experimental prototype shop were never part of the class. No-one ever sought to include them. As I perceive it they have never been involved indirectly or directly in the case in any manner.

MR. BLAND: If I can just add a couple of comments also I don't quite understand why this issue is being raised and perhaps Ms. Wolf or Ms. Roback can clarify this, but I don't think they are claiming that because of Mr. Williams' involvement, not only in the trial of this case but in a great deal of the pre-trial discovery in this case, depositions of Union personnel, all of which was known to both Delores Elliott and Helen Ambrose. We had meetings with them prior to the trial. They fully knew the involvement of Mr. Williams and the Hvass firm long before the trial of this case was started. Unless their claims is that somehow this class and the named plaintiffs got lesser representation because of the entry of the Hvass firm than they got from the Meagher, [197] Geer firm, then I don't see why they are raising this issue.

The Hvass firm got in for two very good reasons. It takes a lot of time and a lot of skill to handle a case like this. Mr. Williams has a great deal of skill with respect to the issues relating to both the Local and the International in this case. He handled those and I think he handled them well and effectively in the pre-trial and at the trial of this case. From that standpoint it was very helpful to us and very beneficial to the class of plaintiffs to have the Hvass firm participate in this case.

Secondly, when you are talking about the kinds of expenses in a case such as this, well over $300,000 in ex-

penses, it was very helpful to have another firm willing to participate in those fees. The Hvass firm did that all along. To me they are raising an issue which when you look at it objectively has absolutely nothing to do with this settlement proposal because they got very good, excellent representation because of the Hvass firm.

THE COURT: Does that answer you, Ms. Roback?

MS. ROBACK: I don't believe it does.

THE COURT: Why do we get involved in all of these side issues. We have enough important problems [198] here to resolve.

MS. ROBACK: I believe it is not a side issue that is involved. If the named plaintiffs and other class members had felt that the class was benefited by the settlement and were happy with the settlement as negotiated, I don't think it would be a problem. First of all, they never did know about Mr. Williams' reinvolvement until trial and they have an affidavit that states so that is attached to our Memorandum in opposition to the settlement. Secondly, I don't think the economic factor of sharing the costs justifies an ethical issue which is a firm that withdrew for a conflict of interest. At least they believed it enough to withdraw before the Court. I think the ethical considerations, and the fact the disposition of this case so far has not been favorable to the named plaintiffs and several other class members, that the issues are intertwined and they are a factor in the case.

THE COURT: You know, Ms. Roback, as well as I do, that we are very fortunate to have somewhat large firms that are able to carry the costs and expenses in this kind of a case. If Ms. Elliott or Ms. Ambrose had come to me and asked for your representation I, of course, would

have to say that you are not qualified. You don't have the ability to carry a case like this and [199] I would have to tell that to any fairly young lawyer and courts around the country have been saying this. Maybe that is unfortunate that only a substantial law firm can afford to participate in a case like this because the experts want their money and want to be paid. Some won't testify until they are paid. It takes a substantial law firm—perhaps as I say, unfortunately—to carry this kind of a case. Your firm couldn't do it—maybe you could borrow the money from the bank, I assume, and obligate yourselves for $350,000.

MS. ROBACK: In response, Your Honor, I feel first of all we are in this now representing Ms. Elliott and Ms. Ambrose for the purpose of objecting to the settlement. We have no intention of retrying the case for them, for the record. But I want to say, too, that I feel Title VII is a method of vindicating social injustices and I don't believe the Legislature wanted it to be a sell-out for economic reasons.

THE COURT: Congress didn't provide in enacting Title VII for any protection for lawyers that are willing to carry an extended kind of litigation. For a small law firm, of course, it is impossible. For a young lawyer, it is impossible.

* * *

January 13, 1981

The Honorable Earl R. Larson
United States District Judge
Federal Courts Building
110 South Fourth Street
Minneapolis, Minnesota 55401

Re: Proposed stipulation of settlement in *Elliott v. Sperry Univac*
4-74 Civ. 627

Dear Judge Larson:

We are the named plaintiffs in the above-referenced case. We wish to give notice to the court that we have serious objections to the proposed settlement agreement that will be offered to the court. While we understand that we will have an opportunity at a later date to present our objections in full to the court, we did not want to wait to make known to the court the unusual circumstances that attended the settlement negotiations and the seriousness of our objections to the substantive conditions of settlement.

We were told that the settlement negotiations began on or about October 27 when Mr. Doty and Mr. Dermott White (Blue Bell, PA) conveyed a monetary offer to Mr. Jones and Mr. Bland. Mr. Bland responded with a written counter-proposal dated November 3, 1980. On or about December 23, 1980 class representative, Delores Elliott, visited the offices of plaintiffs' counsel and talked with Mr. Bradley Jones who informed her, to her surprise and dismay, that Mr. Charles Hvass, Sr. was negotiating the settlement. She asked why since Mr. Hvass, Sr. had withdrawn from the position of plaintiffs' counsel in 1973 because of a potential conflict of interest. He was counsel for

Teamsters and Teamsters were representatives of a local at Univac. Mr. Jones said that the conflict of interest was resolved two years ago. He indicated that Mr. Bland did not care who negotiated the settlement. He further said that Mr. Doty's law firm had engaged Mr. Hvass, Sr. to represent them in a suit involving an excessive fee complaint. On the plane trip to and from the eighth circuit court in St. Louis on which Mr. Doty, Mr. White and Mr. Hvass, Sr. were co-passengers it seems Mr. Doty decided that he would prefer to negotiate with Mr. Hvass, Sr. as he had greater rapport with him. Subsequently, Mr. Doty called Mr. Bland to say he had hoped that he had not hurt Mr. Bland's feelings and that he hoped he didn't mind. Interestingly, when Mr. Bland gave his account of Mr. Hvass' entrance into the case, he said that Mr. Dermott White was on the same flight to St. Louis and was impressed by Mr. Hvass and that Mr. White was the one who wanted Mr. Hvass as the negotiator for the plaintiffs. We expressed strong disapproval that Mr. Hvass, Sr. was involved at all because of our concern that his conflict of interest would color his judgment and because we felt that he was not sufficiently familiar with our case. We also didn't think it proper that the defendants should make the choice of who our negotiator would be. We expressed that we were not consulted nor was our approval sought at any point in time.

On December 30, 1980 we met with Mr. Bland to discuss the settlement offer. Briefly, he indicated that he had set the minimum amount that would be acceptable and that Mr. Hvass had negotiated a settlement above the minimum. We went over each point in the settlement as explained to us by Mr. Bland. We expressed our opinions on each of the terms at length and requested that further effort be

made to improve the settlement. Mr. Bland said that there was nothing else to be negotiated; the agreement was already final and the only thing negotiable was the language that the defendant's counsel was presently writing. Mr. Bland asked us to make our decision and to advise him as to what our decision would be.

With due consideration as to our role as class representatives, we undertook the task of reviewing defendants' expert's, Mr. Hunter's, analysis of the PAC analysis to the best of our ability, we re-read Dr. Mendel's testimony as to the wage similarity as well as job task similarity or dissimilarity within and between job classes, and reviewed all aspects of the settlement. We were thus prepared to give our decision in written and verbalized form to Mr. Bland. A meeting was scheduled for January 6, 1981.

When we arrived at the offices of Mr. Bland, et al., we learned that Mr. Hvass was to attend the meeting. We felt that, rather than trying to explain the settlement to us, he wanted to force us into settling. He made many comments indicating he thought our case was weak. Among the most startling was his comment that we had nearly been thrown out of court on December 12 by defendant's motion to dismiss. When we asked him to explain why he thought so, he said he didn't have time to go into that. He also told us that if we refused the settlement, none of our attorneys would continue to litigate the case unless we raised $300,000 to pay them. He also told us that if we proceeded with the case and lost, we would be held personally liable for defendant's costs of $100,000 to $200,000.

At that meeting, we stated our unwillingness to settle the case until we received the job packets which we believe would substantiate our claims that assemblers are perform-

ing the same or equivalent work of EMA or PMO. We believe that the job packets with rebuttal testimony will provide concrete demonstration of our claims. We were told by our lawyers that they were not going to pursue job packets since Univac was not going to use them in its case. Our lawyers claimed this had always been their intention. We, on the other hand, had always had the impression that we would aggressively seek the job packets and present testimony based on them. At our meeting with Mr. Bland and Dr. Mendel it was determined that when the packets were received we and other employees would describe the work performed by the various job classes and the prints and tools or other equipment utilized in given job operations. We were to use a tape recorder, to the extent possible, in the interest of saving time and having accurate statements of persons currently engaged in the work. We still believe that we have a right to review the job packets and that we cannot really say what an appropriate settlement is until we have evaluated how strong that evidence is.

On January 8, 1981 we met with Mr. Bland in an attempt to obtain a copy of the proposed settlement. We were told that the final draft was not ready. On January 12, we picked up a copy of the settlement which is not the final draft and we also learned that the hearing date remains scheduled for January 16, 1981.

On January 13 we spoke by telephone with Dr. Mendel about the settlement. He said that he had been told by Mr. Bland that we agreed with the settlement and that we had had an opportunity to review the job packets and were unable to identify areas of overlap.

After careful consideration of all of the arguments which have been made to us, it is our position that the proposed

settlement does not serve the best interests of the class nor does it serve the public interest. We have attached, hereto, brief comments or objections to each paragraph that relates to the current collective bargaining contract and settlement payments to the class.

It is our wish that the trial proceed as scheduled while both sides maintain an open door to settlement. Thank you for your consideration of our concerns.

Respectfully submitted,

/s/ Delores E. Elliott
1429 Edgerton
St. Paul, Minnesota 55101

/s/ Helen M. Ambrose
3528 27th Avenue South
Minneapolis, Minnesota 55406

cc: Mr. J. R. Bland

Our comments are necessarily brief inasmuch as the marginal comments are either unreadable or cause doubt as to their intent or impact, and that the terms are too general and are not performance specific. We are also brief for the reason that we find the terms are unreasonable. inadequate, and inequitable.

1. (a) Changing the name of assemblers does not get to the crux of the problem. It denies the diverse, special, and sophisticated skills required in the class. Such broad job categories have an adverse impact upon females. The protracted pay scale would continue to have an adverse socio-economic impact up-

on females until such time as a fair mix of males and females is achieved.

(b) Relieving the assembler class of one year of protracted pay and placing the burden upon another low paid job category is unacceptable.

(c) Univac has long desired a division of their military and commercial divisions. The employees have strongly resisted those efforts as it greatly diminishes job security. To divide the assemblers into three groups does still greater harm to job security. We strongly object to Univac employing this means to obtain that objective.

(d) No strong objection in consideration of the special skills required in the new state of the art in the computer industry.

(e) Margin notation not clear. No objection if back pay is awarded based on 1973 grievance and that the grievance on the new drill/router machine is resolved independently.

(f) No strong objection but believe a more generous time limit could be achieved based upon length of service.

2. Margin notations not clear. Willing to discuss Hay system versus PDRI. Believe monitor group necessary. Is not performance specific.

3. Margin notes make intent and impact unclear.

4. No objection if fair method is first defined with specificity and that the qualification criteria established is not greater that that held by the least qualified incumbent job holder. Object that determining an affirmative action *goal* is not performance specific.

5. No objection to greater notification to employees as to the availability of tuition reimbursement.

6. Object to limit of 1.5 million settlement fund as inadequate and inequitable.

7 & 8. Object that the limit of five categories pay point increments is inequitable as to females with greatest length of service.

* * *

We have an objection that the terms of the proposed agreement does not address past injustices such as those females as qualified but past over in promotion and those persons layed off out-of-seniority.

GRIEVANCE FORM
International Brotherhood of Electrical Workers
Local No. 2047

Plant 1 Dept. Receiving Inspection Step 1
Date 7-13-82 Time 10 PM

Subject of Grievance: Job & Sex discrimination. General Inspectors and Inspectors performing the same jobs—Macrodata and Fairchild testers—at different rates of pay.

Be advised that you are in violation of the following: Article XII Sec. 10, Article XVI Sec. 1 App. A, Article XVII, the Equal Pay Act (1963), the Civil Rights Act (1964) Title VII, and the Equal Employment Act (1972).

In summary: Equal pay for equal work. An employer cannot pay different pay rates to different sexes performing the same job.

Also be advised that aggrieved employees may seek relief under Title VII *without* invoking or exhausting available alternative legal or internal contractual remedies. (Caldwell v. National Brewing Co., 1971). Charges will be filed with the E.E.O.C. if this issue is not resolved immediately.

EMPLOYEE Shirley Walker
Mary Ann Nelson
Julie Drees
Lorie Fenton
Mary Shamp
Signed _____
Employee

STEWARD Mary Harrigan Signed _____

SUPERVISOR Dennis Timm Signed _____
(Business Manager for steps 2 & 3)

A-97

SUPREME COURT OF THE UNITED STATES

No. A-77

HELEN M. AMBROSE,

Applicant,

vs.

SPERRY RAND CORPORATION, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 10, 1985.

Dated this 2nd day of August, 1985.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States